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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1902 1903

No. 268 Supp. 46.

W. W. MONTAGUE AND COMPANY, A CORPORATION, ET AL., PLAINTIFFS IN ERROR,

vs.

EDWARD S. LOWRY AND JAMES J. DALY, PARTNERS TRADING AS LOWRY & DALY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 24, 1903.

(18,513.)

(18,513.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 660.

W. W. MONTAGUE AND COMPANY, A CORPORATION, ET AL., PLAINTIFFS IN ERROR,

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EDWARD S. LOWRY AND JAMES J. DALY, PARTNERS TRADING AS LOWRY & DALY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the United States Circuit Court of Appeals, Ninth Circuit, Northern District of California.

W. W. MONTAGUE AND COMPANY (a Corporation) ET AL., Plaintiffs in Error,
vs.
EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Defendants in Error.

Stipulation Extending Time of Return Day of Writ of Error and Order Thereon.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the return day of the writ of error issued in the above-entitled cause may be, and the same is hereby, extended fifteen (15) days, from and after the 10th day of April, 1901, the date when the said writ of error was made returnable; and that an order may be made upon this stipulation to that effect.

Dated April 5th, 1901.

P. F. DUNNE,
LINFORTH & WHITAKER,
WALTER H. LINFORTH,
Attorneys for Plaintiffs in Error.
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants in Error.

2 Upon reading and filing the above stipulation, it is hereby ordered that the return day of the writ of error issued in said cause be, and the same is hereby, extended fifteen (15) days from and after the 10th day of April, 1901.

WM. W. MORROW, *Judge.*

(Endorsed:) No. 697. In the circuit court of the United States, ninth circuit, northern district of California. W. W. Montague and Company, etc., *et al.*, plaintiffs in error, *vs.* Edward S. Lowry and James J. Daly, etc., defendants in error. Stipulation extending time of return day of writ of error, and order thereon. Filed April 8th, 1901. F. D. Monckton, clerk. Walter H. Linforth, attorney and counselor at law, Claus Spreckels building, San Francisco.

3 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,

vs.

THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA and all the Members of said Association, and also against Columbia Encaustic Tile Co. (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Co. (a Corporation), The Pittsburg Tile Co. (a Corporation), The Trent Tile Co. (a Corporation), W. W. Montague & Co. (a Corporation), Bush & Mallett Co. (a Corporation), The Star Encaustic Tile Co., Ltd. (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte, Heavener Meir and John Doe Stock and Richard Roe Stock, Partners Trading as John Stock Sons, Defendants.

Complaint.

Plaintiffs complain of defendants and for cause of action allege:

4 I.

That the Tile, Mantel and Grate Association of California, and the officers and members thereof, make up and constitute under said name an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, and that they are residents of the city and county of San Francisco and of the city of Sacramento and of the city of San Jose, in the State of California, and of other States, and that all of said defendants are in person or by their agents and representatives carrying on business in the State of California and within the jurisdiction of the northern district of California.

II.

That the Columbia Encaustic Tile Company is a corporation created by and existing under and by virtue of the laws of the State of Indiana; and that the United States Encaustic Tile Works is a corporation created by and existing under and by virtue of the laws of the State of Indiana; and that the Cambridge Tile Manufacturing Company is a corporation created by and existing under and by virtue of the laws of the State of Kentucky; and that the American Tile Company is a corporation created by and existing under and by virtue of the laws of the State of Ohio; and that the Pittsburg Tile Company is a corporation created by and existing under and by virtue of the laws of the State of Pennsylvania; and that the Trent Tile Works is a corporation created by and existing under and by virtue of the laws of the State of New Jersey; and that the Providential Tile Works is

5 a corporation created by and existing under and by virtue of the laws of the State of New Jersey; and that W. W.

Montague and Company is a corporation created by and existing under and by virtue of the laws of the State of California; and that Bush & Mallett Company is a corporation created by and existing under and by virtue of the laws of the State of California; and the Star Encaustic Tile Company, Ltd., is a corporation created by and existing under and by virtue of the laws of Pennsylvania, and Mangrum & Otter is a corporation created by and existing under and by virtue of the laws of the State of California, and that Mrs. Mary Bennett and John H. Schutte are copartners, doing business as Bennett & Schutte, and that John Doe Stock and Richard Roe Stock are partners trading as John Stock Sons.

III.

That John Doe Stock and Richard Roe Stock are fictitious names of persons whose true names are unknown to these plaintiffs, and plaintiffs ask leave when the true names of said persons are ascertained to insert the same.

IV.

That the defendants, The Columbia Encaustic Tile Company, The United States Encaustic Tile Works, The Cambridge Tile Manufacturing Company, The American Tile Company, The Pittsburg Tile Company, The Trent Tile Company, The Providential Tile Works, and The Star Encaustic Tile Company, Ltd., are manufacturers of tiles in the Eastern States; that the defendant Heavener Meir is engaged in the wholesale and retail business of buying and selling tiles, mantels, and grates in the city of Sacramento, State of California; that the defendants John Stock Sons are engaged in said wholesale and retail business in San Jose, State of California; that the defendants W. W. Montague & Co. are engaged in said wholesale and retail business in the city of San Francisco, State of California; that the defendant Bush & Mallett Company are engaged in said wholesale and retail business in the said city of San Francisco, State of California; that the defendants Bennett & Schutte are engaged in said wholesale and retail business in said city of San Francisco, State of California; and that the defendant Mangrum & Otter are engaged in said wholesale and retail business in said city of San Francisco, State of California.

V.

That the city of San Francisco is a city containing upwards of 290,000 population, and the same is situated in the State of California and within the northern district of the State of California; that the city of Oakland is a city containing 40,000 population and upwards, and the same is situated in the State of California and within the northern district of the State of California; that the city of Sacramento is a city containing 30,000 population and upwards, and the same is situated in the State of California and within the northern district of the State of California; that the city of San Jose is a city containing 20,000 population and upwards, and the

same is situated in the State of California and within the northern district of the State of California.

7 That in the said cities, and in each of them, there are a great number of dwellings and houses wherein people live, and buildings used for business and trade purposes and for manufacturing and various other purposes and uses; that new buildings are constantly being erected and constructed in said cities for said purposes, and that in and about the construction of the same great numbers and large quantities of tiles, mantels, and grates are necessarily used; that many large buildings are constantly being constructed therein which are in whole or in part constructed of tiles, and that tiles are requisite and necessary to the proper construction thereof, and that in most of said buildings, being constructed as aforesaid, it is necessary that mantels and grates be placed therein, and that the same are placed therein, for the use and comfort of those occupying, dwelling, or employed therein, and that the said tiles, mantels, and grates are required for the safe construction of some of said buildings and for the comfortable use and occupation thereof.

VI.

That none of the said tiles so used in and about the said dwellings and buildings or in the construction thereof are made or produced in the State of California; practically all of the tiles, as above stated, used in said cities and State are manufactured in the Eastern States, and are imported and brought from the various places where manufactured to the city of San Francisco and to said other cities, where the same are used as aforesaid; that the amount so im-

8 ported or brought within the State of California from the Eastern States for such purposes amount annually in value to the sum of one hundred thousand dollars ($100,000), or thereabouts.

VII.

That for many years last past these plaintiffs have been engaged in the wholesale business of dealing in tiles, by buying, selling, laying, and placing the same in the State of California, with their principal place of business in the city of San Francisco, in said State, and have been dealing in said tiles in other places in said State, and have been during said time customers of and have purchased tiles of many of said corporations engaged, as aforesaid, in the manufacture of said tiles in the East; that plaintiffs have been purchasers of tiles from the Columbia Encaustic Tile Company for several years last past.

VIII.

Plaintiffs allege, upon information and belief, that the above-named defendants, and their associates, who are bound by contract to and with them, comprise all of the wholesale dealers who handle, bring in, and import and sell tiles used in said cities, and comprise all who manufacture the same, and the said defendants, if combined together, can absolutely control the price charged for tiles in the

said cities. That by reason of the fact that San Francisco and the other said cities are located at such a great distance from any manufacturies or wholesale dealers other than said defendants, and those combined with them in other States or foreign countries, who do not belong to the said Tile, Mantel and Grate Association of California, the rates of transportation are prohibitory. That the rates of transportation from any other place than from the factories where the said corporations and persons above named have manufactories, stock on hand, or ware-rooms are so high that no tiles have been or can be imported to the said cities above named. That all of the grates and tiles that are made and manufactured within reach of the State of California, where the rate of freight is such that an importation can be made to San Francisco and said other cities at such an amount as to allow their importation at all, are owned or controlled by the said defendants, or by some of them, or those bound by contract to them.

That before the association, combination, and conspiracy hereinafter referred to, each of the defendants engaged in the said business in the said cities were wholly unconnected and uncombined, and were each selling grates, mantels, and tiles on the respective merits of the articles so sold, and the prices thereof were regulated by the law of supply and demand.

That heretofore and in the years 1896 and 1897, there were in the city of San Francisco and in said other cities divers and numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying thereof. That the said dealers, Heavener Meir, John Stock Sons, W. W. Montague & Co., Mangrum & Otter and Bennett & Schutte, in combination with said other defendants and manufacturers of tiles, with intent to form a contract, trust, and conspiracy in restraint of trade and commerce between the State of California, and the States of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, and with intent to monopolize and to attempt to monopolize, did combine and conspire to monopolize the grate, tile, and mantel importations and trade and commerce from said other States to and with the State of California, to the extent of the grates, tiles, and mantels that were used or could be used in the said State of California in and about the alteration, erected and construction of dwellings and buildings, and they, the said defendants herein, with said intent and for said purpose, did on or about the — day of January, 189–, associate themselves together in the State of California, and did on or about the — day of January, 1898, form an organization, and did adopt a constitution and by-laws. That the said constitution and by-laws are now in full force and effect. That the said constitution and by-laws provide that no sales or deliveries or contracts for the sale or delivery, or for the placing of tiles, grates, and mantels, will be made to any person dealing therein or engaged as a matter of business in the sale, disposal, laying, or placing of tiles, grates or mantels, unless they, the said persons, belong to or join the said unincorporated association, and shall pay, or cause to be paid, over to the said unincorporated association the sum of — dollars, and shall bind and obli-

gate themselves to abide by the rules and regulations, constitution, and by-laws of the said monopoly and unincorporated association, to wit, that is to say, that no one who is a member, belonging to or associated with said unincorporated society or organization, shall
11 sell to, or deal with, or deliver to any one engaged in the business of buying, selling, or placing tiles, grates, and mantels in the cities of San Francisco, Oakland, Sacramento, and San Jose, and other cities in the State of California, as a matter of business, unless the said party who may be engaged in said business, or in dealing, buying, selling, or placing tiles, grates, and mantels shall become a member of said society or organization, and shall pay the initiation fee provided therein, to wit, the sum of — dollars, and shall sign the said constitution and by-laws, and shall agree to be bound thereby, and shall agree not to sell, trade, or deal with anybody to the extent of selling them tiles, grates, or mantels unless said parties shall also join, as a matter of business, the said unincorporated organization.

That prior to the formation of said unincorporated organization, as aforesaid, these plaintiffs were doing a very large business in and about the selling and delivering and placing in position of tiles, grates, and mantels in said cities aforesaid, and were making a profit in said business of five thousand dollars annually for a period of two years prior thereto.

That since the formation of said organization these plaintiffs have been unable to purchase of or from any of said defendants any tiles, grates, or mantels at all; that these plaintiffs have been willing to pay the said defendants in cash for tiles, grates, and mantels which they desired and were necessary in the carrying on and maintaining of their said business, and which they required in order to
12 supply parties who had purchased from them, the said plaintiffs, said tiles, grates, and mantels in said cities aforesaid; that they have offered to the said defendants and tendered to them the price of said tiles, grates, and mantels, but that the said defendants have declined and refused to deliver to them any tiles, grates, or mantels since the organization of said association aforesaid; that at about the time of the formation of said association these plaintiffs had placed with certain of the defendants orders for tiles; that the said orders were not filled, but were canceled by the said parties with whom they were placed for the reason, and for no other reason, that the plaintiffs did not belong to and would not join said organization.

That at about the time of the formation of said association these plaintiffs had placed with the Columbia Encaustic Tile Company orders for tiles; that the said orders were not filled but were canceled by the said Columbia Encaustic Tile Company, for the sole reason that the plaintiffs did not belong to and would not join the said unincorporated association.

IX.

That the said organization is within the provisions of the statutes of the 51st Congress, passed and approved July 2d, 1890, and which

said statutes are known and designated as chapter 647, Supplement to the Revised Statutes at Large.

X.

That by reason of said monopoly and of said unincorporated association and the action of the members thereof, to wit, these
13 defendants, the plaintiffs have been and are now unable to carry on their said business and are unable to do any business at all in tiles, grates, or mantels, and that by reason thereof they have lost a large amount of money; that the profits which they have lost by reason thereof will amount to the sum of ten thousand dollars; that the plaintiffs have been damaged by the said defendants through the said injury to their said business and by the loss of profits thereof in the sum of ten thousand dollars.

That plaintiffs are advised and believe and claim of and from the said defendants, and each of them, as damages caused as aforesaid, the sum of ten thousand dollars.

Wherefore, plaintiffs pray judgment against the said defendants for said sum of ten thousand dollars, and that said sum be trebled in accordance with the provision of said act of Congress, and that said trebled damages be allowed to plaintiffs as against said defendants, and each of them.

For such other and further relief as may to the court seem just and equitable.

REDDY, CAMPBELL & METSON,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Edward S. Lowry, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has heard read the above and foregoing complaint and knows
14 the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

EDWARD S. LOWRY.

Subscribed and sworn to before me this 13th day of October, 1898.

[SEAL.] GEORGE F. HATTON,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed October 14, 1898. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

E. S. LOWRY ET AL., Plaintiffs,
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants.

Demurrer.

Now come W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, Heavenir Meir, and The Tile, Mantel, and Grate Association of California, defendants in the above-entitled action, and demur, and each of
15 them demurs, to the complaint of the plaintiffs filed in said action, and for ground of demurrer thereto say, and each of them says:

1.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them.

2.

That there is a misjoinder of parties defendant in said action in this, that the defendant Columbia Encaustic Tile Company is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

3.

That there is a misjoinder of parties defendant in said action in this, that the defendant The United States Encaustic Tile Works is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

4.

That there is a misjoinder of parties defendant in said action in this that the defendant The Cambridge Tile Manufacturing Company is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

5.

That there is a misjoinder of parties defendant in said action in this, that the defendant, The Pittsburg Tile Company is im-
16 properly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

6.

That there is a misjoinder of parties defendant in said action in this, that the defendant The Trent Tile Company is improperly

made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

7.

That there is a misjoinder of parties defendant in said action in this, that the defendant The Star Encaustic Tile Company, Limited is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

8.

That the said complaint is uncertain in this, that it does not appear therefrom with sufficient certainty, or at all, whether the plaintiffs are, or at any of the times mentioned in the complaint were, engaged in interstate commerce.

9.

That the said complaint is uncertain in this, that it does not appear therefrom with sufficient certainty, or at all, whether the business in which it is stated in said complaint that the defendants are engaged is or was interstate commerce or not.

10.

That the said complaint is uncertain in this, that it cannot
17 be ascertained therefrom with sufficient certainty or at all, whether the acts of the defendants complained of in said complaint, directly or immediately, or at all, interfere with or affect interstate commerce.

11.

That the said complaint is uncertain in this, that it cannot be ascertained therefrom with sufficient certainty or at all how or in what manner, or at all, the plaintiffs have been damaged in the sum of ten thousand dollars ($10,000) or any amount whatever.

Wherefore, said defendants pray that plaintiffs take nothing by the said complaint, and that said defendants have judgment for their costs.

Dated San Francisco, December 5th, 1898.

LINFORTH & WHITAKER,

Attorneys for Defendants W. W. Montague & Company, a Corporation; Bush & Mallett Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavenir Meir, and The Tile Mantel & Grate Association of California.

I do hereby certify that in my opinion the above demurrer is well founded in point of law.

WALTER H. LINFORTH,

Counsel for Defendants Last Named.

(Endorsed:) Service of the within demurrer admitted this 5th day of Dec'r, 1898. Reddy, Campbell & Metson, attorneys for plaintiffs. Filed December 6th, 1898. Southard Hoffman, clerk.

18 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,

vs.

THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Co. (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Co. (a Corporation), The Pittsburg Tile Co. (a Corporation), The Trent Tile Co. (a Corporation), W. W. Montague & Co. (a Corporation), Bush & Mallett Co. (a Corporation), The Star Encaustic Tile Co., Ltd. (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavener Meir, and John Doe Stock and Richard Roe Stock, Partners Trading as John Stock Sons, Defendants.

Summons.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

19 The President of the United States of America, greeting, to The Tile, Mantel & Grate Association of California and all the members of said association, and to Columbia Encaustic Tile Co. (a corporation), The United States Encaustic Tile Works (a corporation), The Cambridge Tile Manufacturing Co. (a corporation), The Pittsburg Tile Co. (a corporation), The Trent Tile Co. (a corporation), W. W. Montague & Co. (a corporation), Bush & Mallett Co. (a corporation), The Star Encaustic Tile Co., Ltd. (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & S-hutte; Heavener Meir, and John Doe Stock and Richard Roe Stock, partners trading as John Stock Sons, defendants:

You are hereby directed to ap-ear and answer the complaint in an action entitled as above, brought against you in the circuit court of the United States, ninth circuit, in and for the northern district of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiffs will take judgment for any money or damages demanded in the complaint as arising upon contract, or they will apply to the court for any other relief demanded in the complaint.

20 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of October, in the year of

our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By W. B. BEAIZLEY,
Deputy Clerk.

Marshal's Return of Service of Summons.

UNITED STATES OF AMERICA, *Northern District of California*, } ss:

I hereby return that I served the annexed summons on the therein-named Bush & Mallett Co., corporation, by handing to and leaving a true and correct copy thereof with H. T. Bush, president of said Bush & Mallett Co., corporation, personally, at San Francisco, in said district, on the 19th day of October, A. D. 1898, together with a certified copy of the complaint attached thereto certified to by plaintiff's attorneys.

JOHN H. SHINE,
United States Marshal,
By J. A. LITTLEFIELD,
Office Deputy.

21 UNITED STATES OF AMERICA, *Northern District of California*, } ss:

I hereby return that I served the annexed summons on the therein-named W. W. Montague & Co., corporation, by handing to and leaving a true and correct copy thereof with W. W. Montague, president of said W. W. Montague & Co., corporation, personally, at San Francisco, in said district, on the 19th day of October, A. D., 1898, together with a certified copy of the complaint attached thereto certified to by plaintiffs' attorneys.

JOHN H. SHINE,
United States Marshal,
By J. A. LITTLEFIELD,
Office Deputy.

UNITED STATES OF AMERICA, *Northern District of California*, } ss:

I hereby return that I served the annexed summons on the therein-named Heavener Mier, whose true name is Hevener, Meir & Company, by handing to and leaving a true and correct copy thereof with C. W. Mier, one of the members of the firm of Hevener, Meir & Company at Sacramento, in said district, on the 22d day of October, A. D. 1898, together with a certified copy of the complaint attached thereto certified by plaintiffs' attorneys.

JOHN H. SHINE,
United States Marshal,
By J. A. LITTLEFIELD,
Office Deputy.

22 UNITED STATES OF AMERICA, *Northern District of California,* } ss:

I hereby certify and return that I served the annexed summons on the therein-named Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte, by handing to and leaving a true and correct copy thereof with Mrs. Mary Bennett and John H. Schutte, personally, at San Francisco, in said district, on the 25th day of October, A. D. 1898, together with certified copy of the complaint attached thereto certified by the plaintiffs' attorney.

JOHN H. SHINE,
United States Marshal,
By J. A. LITTLEFIELD,
Office Deputy.

(Endorsed:) Filed Jan. 23, 1899. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

23 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Copartners Doing Business under the Firm Name and Style of Lowry & Daly, Plaintiffs,

vs.

THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Co. (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Co. (a Corporation), The Pittsburg Tile Co. (a Corporation), The Trent Tile Works (a Corporation), W. W. Montague & Co. (a Corporation), Bush & Mallett Co. (a Corporation), The Star Encaustic Tile Co., Ltd. (a Corporation), Mangrum & Otter (a Corporation), The American Tile Co. (a Corporation), The Providential Tile Works (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavener Meir, and The John Stock Sons (a Corporation), Defendants.

Amended Complaint.

Come now the plaintiffs in the above-entitled action and amending their complaint as of course complain of the defendants, and for cause of action allege:

24

I.

That the plaintiffs are, and were at all the times hereinafter mentioned, copartners doing business under the firm name and style of Lowry and Daly, and are and were at all the times hereinafter mentioned citizens of the State of California and residents of the northern district thereof.

II.

That the Tile, Mantel and Grate Association of California and the officers and members thereof have since on or about the — day of January, 1898, and do now make up and constitute under said name an unincorporated organization composed of the wholesale dealers in tiles, mantels, and grates, and that they have been ever since said date, and are now, citizens and residents of the city and county of San Francisco, and of the city of Sacramento and of the city of San Jose, in the State of California and of the States hereinafter set forth; and that all of said defendants have been since said date, and are now, carrying on business in the State of California and within the jurisdiction of the northern district thereof.

III.

That the Columbia Encaustic Tile Company, was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Indiana; that the United States Encaustic Tile Works was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Indiana; that the Cambridge Tile Manufacturing Company, was at all times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Kentucky; that the Pittsburg Tile Company was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Pennsylvania; that the Trent Tile Works was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of New Jersey; that W. W. Montague & Co. was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of California; that Bush & Mallett Co. was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of California; that the Star Encaustic Tile Company, Ltd., was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Pennsylvania; that Mangrum & Otter was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of California; that the American Tile Company, was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Ohio; that the Providential Tile Works was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of State of New Jersey; that Mrs. Mary Bennett and John H. Schutte are copartners doing business as Bennett & Schutte; and that the John Stock Sons was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of California.

IV.

That the defendants The Columbia Encaustic Tile Company, The United States Encaustic Tile Works, The Cambridge Tile Manufacturing Company, The American Tile Company, The Pittsburg Tile Company, The Providential Tile Works, and The Star Encaustic Tile Company, Ltd., are and were at all the times herein mentioned manufacturers of tiles in the States herein set forth; that the defendant Heavener Meir is and has been since long prior to the 1st day of January, 1898, engaged in the wholesale and retail business of buying and selling tiles, mantels, and grates in the city of Sacramento, State of California; that the defendant John Stock Sons is and was since said last-named date engaged in said wholesale and retail business in San Jose, State of California; that the defendant W. W. Montague Company, is and was since said last-named date engaged in said wholesale and retail business in the city of San Francisco, State of California; that the defendant Bush & Mallett Company, is and was since said last-named date engaged in said wholesale and retail business in said city of San Francisco, State of California; that the defendants Bennett & Schutte are engaged in said wholesale and retail business in said city of San Francisco, State of California, and have been engaged in said business since said date; and that the defendant Mangrum & Otter is and
27 was since said last-named date engaged in said wholesale and retail business in the city of San Francisco, State of California.

V.

That the city of San Francisco is and was at all the times herein mentioned a city containing upwards of 290,000 population, and the same is situated in the State of California and within the northern district of the State of California; that the city of Oakland is and was at all times herein mentioned a city containing 40,000 population and upwards, and the same is situated in the State of California and within the northern district of the State of California; that the city of Sacramento is and was at all times herein mentioned a city containing 30,000 population and upwards, and the same is situated in the State of California and within the northern district of the State of California; that the city of San Jose is and was at all the times herein mentioned a city containing 20,000 population and upwards, and the same is situated in the State of California and within the northern district of the State of California.

That in the said cities, and in each of them, there are, and were at all the times herein mentioned, a great number of dwellings and houses wherein people live, and buildings used for business and trade purposes and for manufacturing and various other purposes and uses; that new buildings are and were at all the times herein mentioned constantly being erected and constructed in said cities for said purposes, and that in and about the construction of
28 the same great numbers and large quantities of tiles, mantels, and grates are and were necessarily used; that many large buildings are and were at all times mentioned herein constantly

being constructed therein, which are and were in whole or in part constructed of tiles, and that tiles are and were requisite and necessary to the proper construction thereof, and that in most of said buildings constructed and being constructed as aforesaid it is and was necessary that mantels and grates be planted therein, and that the said tiles, mantels, and grates are and were required for the safe construction of some of said buildings and for the comfortable use and occupation thereof.

VI.

That none of the said tiles so used in and about the said buildings and dwellings or in the construction thereof are or were at any of the times herein mentioned made or produced in the State of California; practically all of the tiles, as above stated, used in said cities and State are and were manufactured in the Eastern States, and are and were imported and brought from the various places where manufactured to the city of San Francisco, and to said other cities, where the same are and were used as aforesaid; that the amount so imported or brought within the State of California from the Eastern States for such purposes amount- annually in value to the sum of one hundred thousand dollars ($100,000), or thereabouts.

VII.

That for many years last past these plaintiffs have been
29 engaged in the wholesale business of dealing in tiles, mantels, and grates, and in conducting said business prior to the time of the wrongful acts herein mentioned purchased tiles, mantels, and grates from the various corporation defendants herein at their places of business in the States herein mentioned, and shipped the same to the State of California, where the same were sold by plaintiffs at their place of business in the city of San Francisco and at other places in said State, and were so engaged at the time of the forming of the combination and conspiracy herein described. That the defendants herein mentioned, who are residents of the State of California, are and were at all times herein mentioned engaged in the business of dealing in tiles, mantels, and grates and in selling the same in the State of California.

VIII.

Plaintiffs allege, upon information and belief, that the above-named defendants and their associates, who are bound by contract to and with them, comprise all of the wholesale dealers who handle, bring in, and import and sell tiles used in said cities, and comprise all who manufacture the same, and the said defendant-, combined together, can and do absolutely control the price charged for tiles in the said cities. That by reason of the fact that San Francisco and the other said cities are located at such a great distance from any manufactories or wholesale dealers other than said defendants, and those combined with them in other States or foreign countries who do not

belong to the said Title, Mantel, and Grate Association of
30 California, the rates of transportation are prohibitory. That the rates of transportation from any other place than from the factories where the said corporations and persons above named have manufactories, stock on hand, or ware-rooms are so high that no tiles have been or can be imported to the said cities above named. That all of the grates and tiles that are made and manufactured within reach of the State of California, where the rate of freight is such that an importation can be made to San Francisco and said other cities at such an amount as to allow their importation at all, are and have been at all the times herein mentioned owned or controlled by the said defendants, or by some of them, or those bound by contract to them.

That before the association, combination, and conspiracy hereinafter referred to, each of the defendants engaged in the said business in the said cities were wholly unconnected and uncombined, and were each selling grates, mantels, and tiles on the respective merits of the articles so sold, and the prices thereof were regulated by the law of supply and demand.

That heretofore, in the years 1896 and 1897, there were in the city of San Francisco and in said other cities divers and numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying thereof. That the said dealers, Heavener Meir, John Stock Sons, W. W. Montague & Co., Bush & Mallett Company, Mangrum & Otter and Bennett & Schutte, in combination with said other defendants and manufacturers of tiles,
with intent to form a contract, trust and conspiracy in re-
31 straint of trade and commerce between the State of California and the States of Indiana, Kentucky, New Jersey, Pennsylvania and Ohio, for the purpose of controlling the output and regulating the price of said commodities, and with intent to monopolize and to attempt to monopolize said trade, did combine and conspire to monopolize the grate, tile, and mantel importations and trade and commerce from said other States to and with the State of California, to the extent of the tiles, grates, and mantels that were used or could be used in the said State of California in and about the alteration, erection, and construction of dwellings and buildings, and did thereby conspire and combine to raise the price of said commodities in said market aforesaid, and they, the said defendants herein, with said intent and for said purpose, did, on or about the — day of January, 1898, associate themselves together in the State of California, and did, on or about said — day of January, 1898, form an organization, and did adopt a constitution and by-laws, and that said constitution and by-laws are now in full force and effect. That the said constitution and by-laws provide that no sales or deliveries or contracts for the sale or delivery, or for the placing of tiles, grates, or mantels will be made by the said manufacturers thereof to any person dealing therein or engaged as a matter of business in the sale, disposal, laying, or placing of tiles, grates, or mantels, unless they, the said persons, belong to or join the said unincorporated association, and shall pay, or

cause to be paid, over to the said unincorporated association the sum of — dollars, and shall bind and obligate themselves
32 by the rules and regulations, constitution, and by-laws of the said monopoly and unincorporated association, to wit, that is to say, that no one who is a member, belonging to or associated with said unincorporated society or organization, shall sell to, or deal with, or deliver to any one engaged in the business of buying, selling, or placing tiles, grates, or mantels in the cities of San Francisco, Oakland, Sacramento and San Jose, and other cities in the State of California, as a matter of business, unless the said party who may be engaged in said business, or in dealing, buying, selling or placing tiles, grates, and mantels, shall become a member of said society or organization, and shall pay the initiation fee provided therein, to wit, the sum of — dollars, and shall sign the said constitution and by-laws, and shall agree to be bound thereby, and shall agree not to sell, trade, or deal with anybody to the extent of selling them tiles, grates, or mantels, unless said parties shall also join as a matter of business, the said unincorporated organization aforesaid, and shall also agree that in their general business of selling said commodities, as aforesaid, to the general public, they shall sell them at such price as shall be arbitrarily fixed by said unincorporated association without regard to the market price thereof, or the supply or demand thereof.

That prior to the formation of said unincorporated organization, as aforesaid, these plaintiffs were doing a very large business, as copartners, under the name of Lowry and Daly, in and about the selling and delivering and placing in position of tiles, grates,
33 and mantels in said cities aforesaid, and were making a profit in said business of five thousand dollars annually for a period of two years prior thereto.

IX.

That plaintiffs cannot join said organization, as they are informed and believe, for the reason that under and by virtue of said constitution and by-laws it required the unanimous vote of all the members of said association to elect a member thereof, and that by reason of certain business difficulties there are members of said association who, plaintiffs are informed and believe, are antagonistic to them, and would not permit plaintiffs to join said organization if they so desired; and for the further reason that, as plaintiffs are informed and believe, the rules and regulations and by-laws of said association require that members thereof should keep constantly on hand a stock of goods of the value of three thousand dollars, and that as plaintiffs are engaged in the business of contracting and placing tiles, grates, and mantels there are times when their stock does not amount to three thousand dollars in value, but, in fact, there are times when it amounts to a great deal more. And plaintiffs are informed and believe that should they join said association they would be bound in their dealings with the public generally to sell said goods, wares, and merchandise, to wit, tiles, grates, and mantels, at the arbitrary prices fixed by said association, and not at

the fair market price of the same, and, as plaintiffs are informed and believe, said association is illegal and void under and by
34 virtue of the act of Congress approved July 2, 1890, and that by joining the same plaintiffs would be guilty of a crime under said act.

X.

That since the formation of said organization these plaintiffs have been unable to purchase of or from any of said defendants any tiles, grates, or mantels at all; that these plaintiffs have been willing to pay the said defendants in cash for tiles, grates, and mantels which they desired and which were necessary in the carrying on and maintaining of their said business, and which they required in order to supply parties who had purchased from them, the said plaintiffs, said tiles, grates, and mantels in said cities aforesaid; that they have offered to the said defendants and tendered to them the price of said tiles, grates, and mantels, but that the said defendants have declined and refused to deliver to them any tiles, grates, or mantels since the organization of said association aforesaid; that at about the time of the formation of said association these plaintiffs had placed with certain of the defendants orders for tiles; that the said orders were not filled, but were canceled by the said parties with whom they were placed, for the reason, and for no other reason, that the plaintiffs did not belong to and would not join said organization.

That at about the time of the formation of said association these plaintiffs had placed with the Columbia Encaustic Tile Company, orders for tiles; that the said orders were not filled but were can-
35 celed by the said Columbia Encaustic Tile Company, for the reason that the plaintiffs did not belong to and would not join the said unincorporated association.

XI.

That the said organization is within the provisions of the statutes of the 51st Congress, passed and approved July 2d, 1890, and which said statutes are known and designated as chapter (647) six hundred and forty-seven, Supplement to the Revised Statutes at Large of the United States.

XII.

That by reason of said monopoly and of said unincorporated association and the action of the members thereof, to wit, these defendants, the plaintiffs have been and now are unable to carry on their said business, and are unable to do any business at all in tiles, grates, or mantels, and that by reason thereof they have lost a large amount of money; that the profits which they have lost by reason thereof will amount to the sum of ten thousand dollars; that the plaintiffs have been damaged by the said defendants through the said injury to their said business and by the loss of profits thereof in the sum of ten thousand dollars.

That plaintiffs are advised and believe and claim of and from the

said defendants, and each of them, as damages caused as aforesaid, the sum of ten thousand dollars.

Wherefore, plaintiffs pray judgment against the said defendants for said sum of ten thousand dollars, and that said sum be trebled in accordance with the provisions of said act of Congress, and
36 that said trebled damages be allowed to plaintiffs as against said defendants, and each of them.

For such other and further relief as may to the court seem just and equitable.

REDDY, CAMPBELL & METSON,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

James J. Daly, being first duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has heard read the above and foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

JAMES J. DALY.

Subscribed and sworn to before me this 18th day of April, 1899.

[SEAL.] GEORGE F. HATTON,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Due service of within amended complaint admitted this 19th day of April, 1899. Linforth & Whitaker, attorneys for certain defendants. Filed April 9, 1899. Southard Hoffman, clerk.

37 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

E. S. LOWRY ET AL., Plaintiffs,
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants.

Demurrer to Amended Complaint.

Now come W. W. Montague and Company, a corporation, Bush & Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, The John Stock Sons, a corporation, Heavenir Meir, Mangrum and Otter, a corporation, and The Tile, Mantel, and Grate Association of California, defendants in the above-entitled action, and demur, and each of them demurs, to the amended complaint of the plaintiffs filed in said action, and for ground of demurrer thereto say, and each of them says:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them.

II.

That there is a misjoinder of parties defendant in said action
38 in this, that the defendant Columbia Encaustic Tile Company is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

III.

That there is misjoinder of parties defendant in said action in this, that the defendant The United States Encaustic Tile Works is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

IV.

That there is misjoinder of parties defendant in said action in this, that the defendant The Cambridge Tile Manufacturing Company is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

V.

That there is a misjoinder of parties defendant in said action in this, that the defendant The Pittsburg Tile Company is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

VI.

That there is a misjoinder of parties defendant in said action in this, that the defendant The Trent Tile Company is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

39

VII.

That there is a misjoinder of parties defendant in said action in this, that the defendant The Star Encaustic Tile Company, Limited, is improperly made a defendant in said action, and is improperly joined as a defendant therein with each of the other defendants in said action.

VIII.

That the said amended complaint is uncertain in this, that it does not appear therefrom with sufficient certainty, or at all, whether the plaintiffs are, or at any of the times mentioned in the complaint were, engaged in interstate commerce.

IX.

That the said amended complaint is uncertain in this, that it does not appear therefrom with sufficient certainty, or at all, whether the business in which it is stated in said complaint that the defendants are engaged, is or was interstate commerce or not.

X.

That the said amended complaint is uncertain in this, that it cannot be ascertained therefrom with sufficient certainty, or at all, whether the acts of the defendants complained of in said complaint, directly or immediately, or at all, interfere with or affect interstate commerce.

XI.

That the said amended complaint is uncertain in this, that it
40 cannot be ascertained therefrom with sufficient certainty, or at all, how, or in what manner, or at all, the plaintiffs have been damaged in the sum of ten thousand ($10,000.00) dollars or any amount whatever.

Wherefore, said defendants pray that plaintiffs take nothing by the said amended complaint, and that said defendants have judgment for their costs.

Dated San Francisco, May 13th, 1899.

LINFORTH & WHITAKER,

Attorneys for Defendants W. W. Montague and Company, a Corporation; Bush & Mallett Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; The John Stock Sons, a Corporation; Heavenir Meir, Mangrum & Otter, a Corporation, and The Tile, Mantel & Grate Association of California.

I do hereby certify that in my opinion the above demurrer is well founded in point of law.

GEO. E. WHITAKER,

Counsel for Defendants Last Named.

(Endorsed:) Service of the within demurrer to the amended complaint on file herein is admitted this 15th day of May, 1899. Reddy, Campbell & Metson, att'ys pl'ffs. Filed May 15, 1899. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

41 At a stated term, to wit, the March term, A. D. 1899, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 29th day of May, in the year of our Lord one thousand *and* eight hundred and ninety-nine.

Present: The Honorable William W. Morrow, circuit judge.

LOWRY ET AL.
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION, ETC., *et al.* } No. 12698.

Order Confessing Demurrer.

It appearing from the statement of plaintiffs' attorney that an amended complaint and demurrer thereto have been filed herein, it is ordered that the demurrer to the original complaint heretofore filed herein stand confessed.

42 At a stated term, to wit, the November term, A. D. 1899, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 13th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William W. Morrow, circuit judge.

EDWARD S. LOWRY ET AL.
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA *et al.* } No. 12698.

Order Overruling Demurrer.

The demurrer of defendants W. W. Montague *et al.* to the amended complaint herein, heretofore submitted to the court for consideration having been fully considered, and the opinion of the court having been filed, it was, in accordance with said opinion, ordered that said demurrer be, and hereby is, overruled, with leave to said defendants to file an answer herein within ten days from this date.

43 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,
vs.
THE CALIFORNIA TILE, MANTEL AND GRATE ASSOCIATION ET AL., Defendants.

Answer to Amended Complaint.

Now come W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte; John Stock Sons (a corporation), Hevener, Mier and Company (a copartnership, consisting of William C. Hevener and Charles W. Mier), Mangrum and Otter (a corporation), and The Tile, Mantel, and Grate Association of California, defendants in the above-entitled action, and for answer to the amended complaint herein:

I.

These defendants deny that the Tile, Mantel, and Grate Association of California, and the officers and members thereof, or
44 the Tile, Mantel, and Grate Association of California, or any officer or member thereof, have, since the — day of January 1898 or for any other period of time, made up or constituted, or do now make up or constitute, under said name or otherwise, an unincorporated organization composed of the wholesale dealers in tile-, mantel-, and grates, or any or either of said commodities; on the contrary, these defendants aver that the Tile, Mantel, and Grate Association of California, and the officers and members thereof have, since the 7th day of July, 1898, constituted, and do now constitute, under said name, an unincorporated association composed, among other members of a few of the wholesale dealers in tiles.

These defendants further deny that any of the defendants herein, except the defendants now answering, have at any time or times carried on or are now carrying on business in the State of California, or within the jurisdiction of the northern district thereof.

II.

These defendants aver that the defendant styled "Heavener Meir" in the amended complaint is so styled by misnomer, and that the defendant in this case so misnamed is Heavener, Mier and Company, a copartnership, consisting of William C. Hevener and Charles W. Mier, doing business, as alleged, in the city of Sacramento, and said defendant has been such copartnership and engaged in such business since long prior to the 1st day of January, 1896.

45 III.

These defendants deny that in or about the construction of the buildings, dwellings, or houses referred to in paragraph V of the amended complaint any quantity of tiles or mantels or grates are or were necessarily used, or were used otherwise than occasionally and according to the fancy of the special builder or occupant, without the inclusion of any element of necessity.

The defendants further deny that any large building or buildings are or were, at any time in said complaint, constructed, constantly or otherwise, which are or were in whole constructed of tiles, or in part constructed thereof, except in occasional instances and to a limited extent; or that any tile or tiles are or were necessary or requisite in the proper construction thereof; or that in most or any of said buildings referred to in said amended complaint it is or was necessary that any mantel or grate be placed therein.

And defendants further deny that any title, mantel, or grate was or is required for the safe construction, or for the construction in any sense, of some or any of said buildings, or for the comfortable use or occupation thereof, or for any use or occupation of the same.

IV.

Upon the ground that these defendants have no information or belief sufficient to enable them to answer, they deny that the amount of said tiles imported or brought, as alleged, within said State of California from the said Eastern States, or any of them, for any of
46 the alleged purposes, amount annually, or for any other period, in value to the sum of one hundred thousand dollars or thereabouts, or any other sum whatever in excess of the sum of $15,000 annually.

V.

These defendants further deny that for any period of time last past, or at all, the plaintiffs, or either of them, have been engaged in the wholesale business of dealing in tiles, mantels, and grates, or tiles or mantels or grates, or that in conducting such business prior to the pretended wrongful acts alleged, or prior to any other period of time, or during any period of time, or during any time or times, purchased any tile or tiles, or mantel or mantels, or grate or grates from any of the defendants herein at the place of business of said corporations in the said States, or any of them, in the said amended complaint mentioned, or shipped the same or any part thereof to the State of California, or that in said last-mentioned State the same or any part thereof was sold by plaintiffs, or either of them, at any place of business in the city and county of San Francisco, or at any other place in the said State, or that the plaintiffs, or either of them, was so engaged at the time of the formation of the pretended combination or conspiracy alleged, or at any time or times whatever.

VI.

These defendants deny that the defendants named in said amended complaint and their associates bound by contract to or with them, or that said defendants or any associates of said
47 defendants, or that any defendant or any associate, or any associate of any defendant named in said amended complaint, comprise all or other than a few of the wholesale dealers who handle, bring in, import, or sell any tiles used in said cities, or any or either of them, or comprise all or other than a few large manufacturers of the same, or that the said defendants, or any number of them combined together, can or do absolutely control, or control at all, the price charged for tile in any of the said cities, or any or either of them.

These defendants deny that by reason of the alleged distance of San Francisco and said other cities, or any or either of them, from any manufacturer or wholesale dealer (other than the defendants named), or any person or persons combined with them in other States or foreign countries, who does not belong to the said The Tile, Mantel, and Grate Association of California, or from any manufacturer or wholesale dealer whatever any rates of transportation are prohibitory; or that any rates of transportation from any other place than from the alleged factories where the corporations and persons named, or any or either of them, have any manufactory or stock on hand or

ware-room, are so high that no tiles have been or can be imported to the said cities, or any or either of them, mentioned in said amended complaint, or are of such a character as to prevent the importation of tiles to the said mentioned cities, or any or either of them.

And these defendants deny that any grates or tiles are made
48 or manufactured within reach of the State of California (where the rate of freight is such that an importation can be made to San Francisco and said other cities, or any or either of them, at such an amount as to allow their importation at all), or that any other grates or tiles made or manufactured within reach of the State of California are, or at any time in the said amended complaint mentioned have been, owned or controlled by the defendants, or any or either of them, or by any person or persons bound by contract with them.

VII.

These defendants deny that at any time there was any combination or conspiracy as alleged in the amended complaint, or otherwise or at all, to which the defendants named in the said amended complaint, or any or either of them, were or are parties.

VIII.

These defendants deny that in the years 1896–1897, or at any other time or times, Heavener, Mier and Company (misnamed in said amended complaint Heavener Meir), John Stock Sons, W. W. Montague and Company, Bush and Mallett Company, Mangrum and Otter, and Bennett and Schutte, or any or either of them, in combination with any other defendant or defendants in said amended complaint named, or any manufacturer or manufacturers of tiles, or any other person or persons, or with any intent to form any contract, trust, or conspiracy in any restraint of trade or commerce between the State of California and the States of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, or between the State of Cali-
49 fornia and any other State, Territory, district, or country whatever, or for the purpose of controlling any output or regulating any price of said commodities, or any or either of them, or with any intent to monopolize or to attempt to monopolize said alleged trade, or any part thereof, or otherwise or at all combined or conspired to monopolize the grate, tile, and mantel, or grate or tile or mantel importation or importations, or trade or commerce from said other States, or any or either of them, or from any State, Territory, country, or district whatever other than the State of California to or with the said State of California to the extent of any tile, grate, or mantel that was and can be used in said State of California in or about the alteration, erection, or construction of any building, or in or about any other purpose to which said commodity can be put, or to any extent, or to any purpose whatever, or at all. Or did thereby or otherwise or at all conspire or combine to raise the price of said commodities, or any or either of them, in said market, or elsewhere, or at all.

These defendants deny that with any intent or for any purpose,

as alleged, they at any time associated themselves together, or with any other person or persons, or that any number of them so associated themselves together in said State of California, or at any time formed any organization or adopted any constitution or by-laws, or that the same or any part thereof are now in any force or effect.

IX.

These defendants further deny that any constitution or by-
50 laws adopted by said defendants, or any of them, or in any force or effect, provided no sale or delivery, or contract for the sale and delivery, or sale or delivery, or for the placing of any tile, grate, or mantel would be made by the manufacturers thereof to any persons dealing therein, or engaged as a matter of business in the sale, disposal, laying, or placing of any tile, grate, or mantel, or to any other person unless said person belonged to or joined any association of defendants, or any of them (or that any constitution or by-laws adopted by any association of defendants, or any of them, contained any provision concerning the sale or delivery, or any contract for the sale or delivery or for the placing of any tile, grate, or mantel by the manufacturers of such commodities, or by any manufacturers thereof, other than a few out of a great number of the same), or unless such person or persons belonged to, or unless such person or persons should cause to be paid to, said organization any sum of money, or should bind or obligate themselves to abide by any rule or regulation, constitution, or by-law of any such organization or pretended monopoly; or that no one who is a member of or associated with any such society or organization of defendants, or any of them, should sell to or deal with or deliver to any one engaged in buying, selling, or placing any grate, tile, or mantel in the cities of San Francisco, Oakland, Sacramento, or San Jose, or any other city in the State of California, as a matter of business, or to any other person whatever unless such person should become a member of any such society or organization, and pay any required initiation fee in any amount, or pay any such initiation fee and
51 sign any constitution and by-laws, or sign any constitution and by-laws, and agree to be bound thereby, or agree to be bound thereby, and agree not to sell, trade, or deal with anybody to the extent of selling any tile, grate, or mantel, or agree not to sell, trade, or deal with anybody to the extent of selling any tile, grate, or mantel unless such persons shall also join, as a matter of business, any such organization of defendants, or any of them, or with any limitation, or otherwise, or shall agree that in their general business, or any business, to sell any of such commodities to the general public, or to any purchasers, they shall sell them at any such price as shall be arbitrarily fixed by any such association, without regard to the market price or the supply or demand thereof, or otherwise, or at all; and shall agree that in their general or any business of selling any such commodities to the general public or to any purchaser they shall sell them, or any or either of them, at any fixed price, without regard to the market price thereof, or the supply or demand thereof, or otherwise, or at all.

X.

Upon the ground that they have no information or belief sufficient to enable them to answer, these defendants deny that at any time prior to the formation of any association by the defendants, or any of them, or at any time or times, the plaintiffs were doing a large business, as copartners, under said name of Lowry and Daly, in and about the sale or delivery or placing in position of any tile, grate, or mantel in said cities, or either or any of them, or were doing
52 a business of any extent therein; or were making any profit in said business of five thousand dollars annually for a period of two years, prior to any such formation of any such organization, or were making any profit in said business to any amount annually, or for any other length of time, or for any period whatever, or making any profit in said alleged business at all.

XI.

These defendants deny that the plaintiffs, or either of them, cannot join any association of defendants, or any of them, for the reason that by virtue of any constitution or by-laws of such association it requires the unanimous vote of the members thereof to elect a member thereof, or for any reason depending upon the number of votes of the members of any such association required for the election of a member, or that by reason of any business difficulties, or any reason at all, there are any members in such association who are antagonistic to the plaintiffs or either of them, in any sense precluding their election as members of any such organization, or would not permit plaintiffs, or either of them, to join any such association if they so desired, or by reason of the existence of any rule or regulation or by-laws of any such association requiring the members thereof to keep constantly on hand a stock of goods of the value of three thousand dollars; and in this connection, and upon the ground that defendants have no information or belief sufficient to enable them to answer, they deny that at any time or times the stock of the plaintiffs amounts to a great deal more, or amounts to any more, than three thousand dollars in value.
53 And these defendants deny that the plaintiffs, or either of them, in the event of joining such association of defendants, or any of them, would be bound in any dealings with the public or with any person or persons, to sell any goods, wares, or merchandise, or grates or tiles or mantels, at any arbitrary prices fixed by such organization, or not at the fair market price of the same, or that said association is illegal or void under and by virtue of the act of Congress, approved July 2, 1890, or is illegal or void, or that the plaintiffs by joining it would be guilty of a crime under said act, or otherwise, or at all.

XII.

These defendants deny that since the formation of any organization of defendants, or any of them, the plaintiffs, or either of them, have been unable to purchase of and from any of the defendants

any tiles, grates, or mantels, or that the plaintiffs, or either of them, have been willing to pay the defendants, or either or any of them, any cash for any grates, tiles, or mantels they desired, or which were necessary in carrying on or maintaining their business, or which they required in order to supply any parties who had purchased from them any grates, tile-, or mantels in any of said cities, or that they have offered or tendered to defendants, or any or either of them. the price of any grates, tile-, or mantels with the result that defendants, or any or either of them, have declined or refused to deliver to plaintiffs, or either of them, any grates, tiles, or mantels since the organization of such association of defendants, or
54 any of them, or during any period of time. Or that at the time of the formation of any association of defendants, or any of them, or at any other time, plaintiffs, or either of them, had placed with any of the defendants any orders or order for tiles, which order or orders were not filled, but canceled by any of said defendants, for the reason, and none other, that plaintiffs, or either of them, did not belong to and would not join any organization of defendants, or any of them, or which were not filled or were canceled for any reasons except for reasons of non-payment.

With reference to the alleged orders for tiles alleged in said amended complaint to have been placed by plaintiffs with the said Columbia Encaustic Tile Company, these defendants say that said orders were not filled, but were canceled by said company for reasons of non-payment, and that it is not true that the alleged fact that plaintiffs did not belong to and would not join any association of defendants, or any of them, was the sole reason, or was any reason whatever, for the circumstance that said orders were not filled but were canceled.

XIII.

These defendants deny that any organization of the defendants named in said amended complaint, or any of them, is within the provisions of any statute of the Fifty-first Congress, passed or approved July 2, 1890, or known or designated as chapter 647, Supplement to the Revised Statutes at Large of the United States, or any provision thereof.

55

XIV.

These defendants deny that by reason of any pretended monopoly, or of any association of defendants, or any of them, or any action of any member of any association of defendants, or any of them, the plaintiffs, or either of them, have been or now are unable to carry on their alleged business, or to do any business at all in tiles, grates, or mantels, or that by reason of the same, or of any act or omission of the defendants, or any or either of them, the plaintiffs, or either of them, have lost any amount of money or any profits in the sum of ten thousand dollars, or in any other sum whatever, or have been damaged by the defendants, or any of them, in the sum of ten thousand dollars, or in any other sum whatever, or at all.

And these defendants deny that there is any foundation for any

advice, belief, or claim that plaintiffs, or either of them, have been damaged in any amount by the defendants, or any or either of them.

Wherefore, these defendants pray that the plaintiffs take nothing of their amended complaint, and that the defendants go hence, without day, with their costs of suit.

WALTER H. LINFORTH,
Attorney for said Answering Defendants.

56 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

A. A. Watkins, being duly sworn, deposes and says that he is the vice-president of W. W. Montague and Company (a corporation), one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters, he verily believes it to be true.

A. A. WATKINS.

Subscribed and sworn to before me this 24th day of January, A. D. 1900.

[SEAL.]

O. C. PRATT,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Service of the within answer of certain defendants to amended complaint is hereby admitted by copy this 24th day of January, A. D. 1900. Reddy, Campbell & Metson, attorneys for plaintiffs. Filed January 24th, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

57 In the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, ETC., Plaintiffs,
vs.
THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA ET AL., Defendants.

Amendments to Amended Complaint.

Come now the plaintiffs above named and by leave of court first had and obtained make and file these their amendments to their amended complaint heretofore filed in the above-entitled action:

I.

In paragraph III of said amended complaint, in line 18 of page 3, and after the words "State of Pennsylvania," insert as follows: "That the Ohio Foundry Company was at all the times herein mentioned, and is now, a corporation created and existing under and by virtue of the laws of the State of Ohio."

II.

In paragraph IV of said amended complaint, in line 7 of page 4, after the words "herein set forth" insert as follows: "and
58 that the said Ohio Foundry Company was at all said times a manufacturer of goods in the State of Ohio."

III.

In paragraph VII of said complaint, in line 18, page 6, after the word "wholesale," insert the words "and retail."

IV.

To paragraph X of said amended complaint, and at the end thereof, and "that at various times between the — day of ——, 1899, and the — day of ——, 1900, for the sole reason that the plaintiff did not belong to and would not join the said unincorporated association, the said Ohio Foundry Company refused to sell any grates to said plaintiffs; that prior to said first-mentioned date said plaintiffs had bought grates from said Ohio Foundry Company at a certain fixed price, which said price was, at all times has been, and now is, the price at which said Ohio foundry sold and now sells said grates to its customers and to the members of said unincorporated association; that by reason of such refusal said plaintiffs were forced to buy grates in the open market at a price in advance of the said price of said Ohio Foundry Company, to wit, at an advance of one and $\frac{20}{100}$ (1.20) dollars per grate; and that between said dates plaintiffs were compelled to so purchase a large number, to wit, four hundred (400) of such grates."

59

V.

In paragraph XII of said amended complaint, and in line 22 of page 12, after the word "dollars," insert as follows: "That in the prosecution of this action the said plaintiffs have incurred as costs an attorneys' fee in the sum of one thousand (1,000) dollars, and that the said sum is the reasonable value of the services performed by plaintiffs' attorneys in said action."

VI.

In the prayer of said amended complaint, and in line 30 of page 12, after the words "each of them," insert: "For an attorneys' fee of one thousand (1,000) dollars, and for their other costs of suit."

CAMPBELL & METSON,
Attorneys for Plaintiffs.

(Endorsed:) Service of within amendments admitted this 26th day of December, 1900. P. F. Dunne, Walter H. Linforth, attorneys for certain defendants. Filed December 26, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

5421

60 In the Circuit Court of the United States for the Northern District of California.

EDWARD S. LOWRY ET AL., Plaintiffs,
vs.
THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants. } No. 12698.

Verdict.

We, the jury, find in favor of the plaintiffs, and assess the damages at the sum of five hundred ($500) dollars.

J. J. WHITE, *Foreman.*

(Endorsed:) Filed December 27, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

61 In the Circuit Court of the United States for the Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Copartners Doing Business under the Firm Name and Style of Lowry & Daly, Plaintiffs,
vs.
THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants. } No. 12698.

Judgment.

This cause having come on regularly for trial upon the 13th day of December, 1900, being a day in the November, 1900, term of said court, before the court and a jury of twelve men, duly impaneled and sworn to well and truly try the issues joined herein; Joseph C. Campbell and Robert W. Campbell, Esqs., appearing upon behalf of plaintiff, and Walter H. Linforth and Peter F. Dunne, Esqs., appearing upon behalf of the defendants W. W. Montague and Company, a corporation *et al.*, who have appeared and answered herein; and the trial having been proceeded with, and the evidence, oral and documentary; on behalf of the respective parties having been introduced and closed; and the cause, after arguments of the at-

62 torneys for the respective parties, and that instructions of the court having been submitted to the jury; and the jury having subsequently returned the following verdict: "We, the jury, find in favor of the plaintiffs and assess the damages at the sum of five hundred ($500) dollars;" and the court, after hearing and consideration of a motion in that behalf, ordered that judgment be entered herein in favor of plaintiffs and against the defendants who have appeared and answered herein for treble the amount awarded by the verdict of the jury, together with an attorneys' fee in the sum of seven hundred and fifty dollars, and for costs.

Now, therefore, by virtue of the law and by reason of the premises

aforesaid, it is considered by the court that Edward S. Lowry and John J. Daly, copartners doing business under the firm name and style of Lowry and Daly, plaintiffs herein, do have and recover of and from W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte, John Stock Sons (a corporation), Hevener, Mier and Company (a copartnership consisting of William C. Hevener and Charles W. Mier), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, defendants herein, the sum of fifteen hundred dollars ($1500), together with an attorneys' fee in the sum of seven
63 hundred and fifty dollars ($750), and their costs in this behalf expended, taxed at $113.95.

Judgment entered January 2, 1901.

SOUTHARD HOFFMAN, *Clerk.*

A true copy. Attest:
[SEAL.]

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed:) Filed January 2, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

EDWARD S. LOWRY ET AL., Plaintiffs,
vs.
THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants. } No. 12698.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the circuit court of the United States, for the ninth judicial circuit, northern district of Cali-
64 fornia, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 2d day of January, 1901.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed:) Judgment-roll. Filed January 2, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,
vs.
THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants.
No. 12698.

Answer of Certain Defendants to Amendments to Amended Complaint.

Now come W. W. Montague and Company (a corporation), Bush and Mallet Company (a corporation), Mrs. Mary Bennett and
65 John H. Schutte, partners trading as Bennett & Schutte, John Stock Sons (a corporation), Hevener, Mier and Company (a copartnership, consisting of William C. Hevener and Charles W. Mier), Mangrum & Otter (a corporation), and The Tile, Mantel, and Grate Association of California, defendants in the above-entitled action, and for answer to the amendments to the amended complaint filed herein.

I.

These defendants deny that at various, or any time or times between the — day of —— 1899, and the — day of —— 1900, or at any other time or at all, for the reason, sole or otherwise, that the plaintiffs did not belong to or would not join the Tile, Mantel, and Grate Association of California, the said Ohio Foundry Company refused to sell grates to plaintiffs; and deny that the price at which plaintiffs purchased grates from the said Ohio Foundry Company at the time specified in the amendments to said amended complaint was or is the price at which the said Ohio Foundry Company sold or now sells grates to members of the said association, or to its customers; deny that by reason of any such refusal of the Ohio Foundry Company plaintiffs were forced to or did b-y grates in the open market at a price in advance of the price of said Ohio Foundry Company, or at an advance of one and $\frac{2}{100}$ dollars ($1.20) per grate, or at an advance of any sum or amount whatever over and above the regular selling price of grates to any and every person, whether
a member of said association or not; deny that between the
66 dates referred to in said amendments to said amended complaint, or at any other time or at all, plaintiffs were obliged to or did purchase a large or any number of said grates.

II.

These defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of paragraph V of the amendments to said amended complaint, and basing their denials upon this ground, they deny that in the prosecution of this action the said plaintiffs have incurred as costs an attorneys' fee in the sum of one thousand dollars ($1,000), or in any sum or amount

whatever, and deny that said sum of one thousand dollars ($1,000), or any other sum or amount, is the reasonable value of the services performed by plaintiffs' attorneys, or any of them, in this action.

P. F. DUNNE,
WALTER H. LINFORTH,
Attorneys for said Answering Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

A. A. Watkins, being duly sworn, deposes and says that he is the vice-president of W. W. Montague and Company (a corporation), one of the defendants in the above-entitled action; that he has heard read the foregoing answer to the amendments to plaintiff's amended complaint, and knows the contents thereof; that the same is
67 true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he verily believes it to be true.

A. A. WATKINS.

Subscribed and sworn to before me this 7th day of January, A. D. 1901.

[SEAL.]

O. C. PRATT,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Service of the within answer of certain defendants to amended complaint admitted this 7th day of January, 1901. ——— ———, att'ys for pl'ff-. Filed January 7, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

68 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Copartners Doing Business under the Firm Name and Style of Lowry & Daly, Plaintiffs,

vs.

THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Company (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Company (a Corporation), The Pittsburg Tile Company (a Corporation), The Trent Tile Works (a Corporation), W. W. Montague & Company (a Corporation), Bush & Mallett Company (a Corporation), The Star Encaustic Tile Company, Limited (a Corporation), Mangrum & Otter (a Corporation), The American Tile Company (a Corporation), The Providential Tile Works (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte, Heavener Meir, and The John Stock Sons (a Corporation), Defendants. } No. 12698.

MONDAY, *November* 13, 1899.

Opinion on Demurrer to Amended Complaint.

Action at law to recover damages under the provisions of the act of July 2, 1890 (26 U. S. Stats. at Large, 209).

69 Reddy, Campbell & Metson, attorneys for plaintiffs.
Linforth & Whitaker, attorneys for certain defendants.

MORROW, *Circuit Judge:*

This is an action at law, brought to recover damages alleged to have been sustained by plaintiffs by reason of injury to their business caused by the forming of an association by defendants claimed to be within the prohibitory provisions of the act of Congress of July 2, 1890, commonly known as the "Sherman anti-trust act."

The amended complaint alleges that plaintiffs are copartners, doing business under the firm name of Lowry & Daly, citizens of the State of California, and residents of the northern district of said State; that the Tile, Mantel & Grate Association of California, and the officers and members thereof have since the — day of January, 1898, and do now, constitute an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, and that they are now, and ever since that day have been, citizens and residents of the city and county of San Francisco, and of the city of Sacramento, and of the city of San Jose, in the State of California, and of the States set forth hereinafter, and that all said defendants have been since that date and now are carrying on business in the State of California and within the jurisdiction of the northern dis-

trict thereof; that the defendants hereinafter named are corporations created and existing under the laws of the respective States set opposite to their names: Columbia Encaustic Tile Company,
70 Indiana; United States Encaustic Tile Works, Indiana; Cambridge Tile Manufacturing Company, Kentucky; Pittsburg Tile Company, Pennsylvania; Trent Tile Works, New Jersey; W. W. Montague & Co., California; Bush & Mallett Company, California; Star Encaustic Tile Company, Limited, Pennsylvania; Mangrum & Otter, California; American Tile Company, Ohio; Providential Tile Works, New Jersey; The John Stock Sons, California.

That the defendant-, The Columbia Encaustic Tile Company, Cambridge Tile Manufacturing Company, The American Tile Company, The Pittsburg Tile Company, The Providential Tile Works, and The Star Encaustic Tile Company, Limited, are and were at all the times mentioned manufacturers of tiles in the States set forth, and that the defendants Heavener Meir, The John Stock Sons, W. W. Montague & Company. Bush & Mallett, Bennett & Schutte, and Mangrum & Otter, are and ever since January 1, 1898, have been, engaged in the wholesale and retail business of buying and selling tiles, mantels, and grates in the cities of Sacramento, San Jose, and San Francisco, in this State; that the following cities, with the respective population placed opposite their names, are each situated in the northern district of California: San Francisco, 290,000 and upwards; Oakland, 40,000 and upwards; Sacramento, 30,000 and upwards; San Jose, 20,000 and upwards; that in said cities there are a great number of dwelling-houses, buildings used for business, trade purposes and manufactories; that new buildings are being constantly erected, and in their construction large quantities of tiles, mantels, and
71 grates are necessarily used for their safe construction and comfortable occupation; that none of the tiles used about buildings or dwellings are made in the State of California, but are manufactured in Eastern States, and imported thence, and such importations into this State amount to the annual value of $100,000 or thereabouts; that for many years past plaintiffs have been engaged in the wholesale business of dealing in tiles, mantels, and grates, and in conducting this business have purchased these articles from the various corporations defendant, and shipped them to the State of California, and there sold them; that defendants and their associates who are bound by contract with them comprise all the wholesale dealers who handle and import and sell tiles in the cities aforesaid, and when combined together can and do absolutely control the price charged for tiles in said cities, by reason of the distance of these cities from any manufacturers or wholesale dealers other than defendants and those combined with them in other States or foreign countries who do not belong to the said Tile, Mantel & Grate Association of California; the rates of transportation are prohibitory, so that no tiles have been or can be imported from places other than those in which the corporations and above-named persons have manufacturies, stock on hand, or ware-rooms, and all the grates and tiles made and manufactured within reach of the State of California, where the rate of freight is such that an importation can be made

to San Francisco and said other cities at such an amount as to admit of their importation at all, are and at all times mentioned
72 have been controlled by the said defendants, or some of them, or those bound by contracts to them; that before the association, combination, and conspiracy hereinafter referred to defendants were uncombined, and were selling grates, mantels, and tiles on their respective merits, their prices being determined by the law of supply and demand; that in the years 1896 and 1897 there were in San Francisco and the other said cities numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying of them; that defendants, with intent to form a contract, trust, and conspiracy, in restraint of trade and commerce between the State of California and the States of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, for the purpose of controlling the output and regulating the price of these commodities, and monopolizing the said trade, combined and conspired to monopolize the grate, tile, and mantel importations and trade and commerce from other States to and with the State of California, to the extent of the tiles, grates, and mantels that could be used in the State of California, in the erection and construction of dwellings and buildings, and so conspired to raise the price of these commodities in the California market; and for this purpose, on or about the — day of January, 1898, formed an organization and adopted a constitution and by-laws, which constitution and by-laws are now in effect; that the said constitution and by-laws provide: That no sales and deliveries or contracts for the sale or delivery or the placing of tiles, grates, or mantels will be made by the manu-
73 facturers thereof to any person dealing in these commodities unless such person belong to the said unincorporated association, and shall pay or cause to be paid — dollars to that organization, and bind themselves to abide by its constitution and by-laws; that is to say, that no one who is a member of that organization shall sell to or deal with or deliver to any person engaged in the business of buying, selling, or placing tiles, grates, or mantels in the cities of San Francisco, Oakland, Sacramento, and San Jose, and other cities in this State, unless such person shall become a member of the said unincorporated organization, and shall agree that in their general business of selling such commodities to the general public, they shall sell them at such prices as may be arbitrarily fixed by the said unincorporated association.

That prior to the formation of that organization, plaintiffs were doing a large business in selling tiles, mantels, and grates, and were making an annual profit of about $5,000; that plaintiffs are unable to join the said organization because, according to its constitution and by-laws, a unanimous vote of the members of the association is required to elect a member thereof, and certain members of that organization are so antagonistic to plaintiffs by reason of business differences that they would not allow them to enter the organization; and further, the rules and regulations of the association require that members must keep constantly in stock goods to the value of

74 $3,000, and there are times when plaintiffs' stock does not amount to that value; that if plaintiffs join said association they would be bound to sell their wares at prices arbitrarily fixed by the association, and not at their fair market value; that said association is illegal and void, by virtue of the act of Congress approved July 2, 1890, and by joining it plaintiffs would be guilty of a crime under the said act; that since the formation of said organization plaintiffs have been unable to purchase tiles, mantels, or grates from any of the defendants, although they have tendered to the defendants the price of the same; that defendants have refused to deliver any tiles, mantels, or grates to them since the organization of said association; that about the time of the formation of said association plaintiffs had placed with defendants certain orders for tiles, but these orders were not filed, but were canceled by the parties with whom they had been placed, for the reason that plaintiffs did not belong to and would not join said organization; that about the time of the formation of the association plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which canceled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel and Grate Association; that said organization is within the statute of the 51st Congress passed and approved July 2, 1890, known as chapter 647, Supplement to the Revised Statutes at Large of the United States; that by reason of the monopoly of such association plaintiffs are damaged in the sum of ten thousand dollars.

Plaintiffs pray for treble the sum of ten thousand dollars, in accordance with the provisions of the above-named act, and for further equitable relief.

75 To this amended complaint the defendants W. W. Montague & Company, a corporation, Bush & Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte, the John Stock Sons, a corporation, Heavener Meir, Mangrum & Otter, a corporation, and the Tile, Mantel & Grate Association, filed a demurrer. The grounds of this demurrer are: That the amended complaint does not state facts sufficient to constitute a cause of action against defendants or any of them; that there is a misjoinder of parties defendant, in that the Columbia Encaustic Tile Company, the United States Encaustic Tile Works, the Cambridge Tile Manufacturing Company, the Pittsburg Tile Company, the Trent Tile Company, and the Star Encaustic Tile Company, Limited, are all improperly made and joined as defendants in this action; that the amended complaint is uncertain, (1) in that it does not appear therefrom whether the plaintiffs were, at any of the times mentioned in the amended complaint, engaged in interstate commerce; (2) in that it cannot be ascertained therefrom whether the acts of defendant complained of interfere with interstate commerce directly, immediately, or at all; (3) in that it cannot be ascertained therefrom with sufficient certainty whether plaintiff has been damaged in the sum of $10,000, or at all.

It does not appear from the record that the foreign corporations joined as defendants have been served with process, and they have made no appearance.

This action is brought under the provisions of an act
76 of Congress dated July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (26 U. S. Stats. at Large, 209.) Section 7 of this act provides:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit including a reasonable attorneys' fee."

It is contended by the counsel for defendants that there is a misjoinder of parties defendant in the amended complaint, in that certain corporations organized and doing business in States other than this State have been joined as defendants in this action, such corporations being residents of districts other than this, and not found within this district, so that no service of process can be made upon them and themselves subjected to the jurisdiction of the court.

The allegations of the amended complaint in this respect are as follows: "All of said defendants have been since that date and are now carrying on business in the State of California, and within the jurisdiction of the northern district thereof."

Defendants' counsel contend that these allegations are not such as to give the court jurisdiction over such defendants as do not
77 reside in this district, and that as the defendant corporations joined with them reside only in the States in which they have been respectively organized, they can only be sued in their own districts.

It is contended by plaintiffs' counsel that the defendants who have demurred are estopped from demurring to the amended complaint, upon the ground that some of their codefendants are being sued in the wrong district, since they have made a general appearance, and by so doing have lost the right to raise the question that there is a misjoinder of parties on these grounds.

In the case of Interior Construction Co. *v.* Gibney, 160 U. S. 217, the action was at law, and the court discussed the effect of a general appearance by a defendant upon a demurrer by the same defendant based upon jurisdictional grounds. In this case the complaint alleged that the plaintiff was incorporated under the laws of New Jersey, and was a citizen of that State, and that all the defendants were citizens and residents of the State of Indiana. "On June 19, 1890, the defendants Gibney, McElwaine, and Wheeler, by their attorney, entered a general appearance, but Gibney neither pleaded nor answered, and the defendant Bartley never appeared or made any defense. On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the State of Pennsylvania, and not citizens or residents of the State of Indiana, and that therefore the court had no jurisdiction of the case. The

78 plaintiff demurred to this plea as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs." The case was taken to the Supreme Court upon a writ of error. Mr. Justice Gray delivered the opinion of the court, and in the course of that opinion said, at page 220:

"In Smith *vs.* Lyon, 133 U. S. 315, this court held that the provision of the act of 1888 as to the district in which a suit between citizens of different States should be brought required such a suit in which there was more than one plaintiff or more than one defendant to be brought in the district in which all the plaintiffs or all the defendants were inhabitants.

"When there are several defendants, some of whom are and some of whom are not inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the non-resident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, specially where as in this case an action is brought against the principals and sureties on a bond, and one of the principals is a non-resident and does not appear, the defendants who do come in may object at the proper stage of the proceedings to being compelled to answer the suit.

"But in the present case it is unnecessary to decide that question. Because one of the principals and both sureties, being all the

79 defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and of course cannot object that others of the defendants were such."

The judgment of the circuit court was reversed, and the case remanded, with directions to sustain the demurrer to the plea.

A general appearance, therefore, on the part of these defendants must be deemed a waiver of the objection of a misjoinder because the other defendants are not inhabitants of this district. Counsel contend that they have not made such a general appearance, but have demurred specially on the ground that certain defendants are improperly joined with them. The terms of the demurrer constitute a sufficient answer to this contention.

The grounds of demurrer are not confined to the jurisdiction of the court, but the merits of the case are involved in the objection that the complaint does not state facts sufficient to constitute a cause of action.

In the case of the Southern Pacific Company *vs.* Denton, 146 U. S. 202, the question of special appearance was considered. The action was at law, and was brought in the circuit court of the United States for the western district of Texas. The petition alleged that the defendant was a corporation duly incorporated under the laws of the State of Kentucky, a citizen of the State of Kentucky,

80 and a resident of El Paso county, in the State of Texas; that defendant "was and is engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio, and the city of San Antonio, all of the State of Texas; that the defendant is now doing business as aforesaid, and has an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup." The plaintiff resided in the county of Red River, which is in the eastern district of Texas. Defendant, by leave of court, filed a document designated as an answer or demurrer, "for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court," and demurred and excepted to the petition because upon the above allegations "it appears that the suit ought, if maintained at all in the State of Texas, to be brought in the district of the residence of the plaintiff—that is to say, in the eastern district of Texas;" and the defendant prayed judgment whether the court had jurisdiction. The court overruled the demurrer. Defendant thereupon answered to the merits, and judgment being given against it, sued out a writ of error in the *United Supreme Court* on the question of jurisdiction only under the act of February 25, 1889 (25 Stats. 693, c. 236). Mr. Justice Gray said, at page 206:

"It may be assumed that the exemption from being sued in any other district might be waived by the corporation by ap-
81 pearing generally or by answering to the merits of the action without first objecting to the jurisdiction. (St. Louis & San Francisco R'y *vs.* McBride, 141 U. S. 127; Texas & Pacific R'y *vs.* Cox, 145 U. S. 593.) But in the present case there was no such waiver. The want of jurisdiction being apparent on the face of the petition might be taken advantage of by demurrer, and no plea in abatement was necessary. (Coal Co. *vs.* Blatchford, 11 Wall. 172.) The defendant did file a demurrer for the special and single purpose of objecting to the jurisdiction, and it was only after that demurrer had been overruled and the defendant had excepted to the overruling thereof, that an answer to the merits was filed."

The case of St. Louis & San Francisco R'y *vs.* McBride, 141 U. S. 127, 130, cited in Southern Pacific Co. *vs.* Denton, *supra*, was also an action at law; and the only question involved was what constituted a general appearance and its effect upon the jurisdiction of that court. Mr. Justice Brewer, delivering the opinion of the court, said:

"Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds, two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance a general appearance to the merits.
82 If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service,

but all special privileges of the defendant in respect to the particular court in which the action is brought."

In the case at bar defendants did not file their demurrer "for the special and single purpose of objecting to the jurisdiction," but for the further purpose of attacking the merits of the case upon the facts as stated in the complaint, and this last issue the court is called upon to decide as a material question in controversy, as will appear hereafter.

The appearance of defendants demurring in this action must, in view if these authorities, be regarded as a general appearance, and they are therefore prevented from objecting that their codefendants are improperly joined with them on the ground that they are being sued in the wrong district.

Considering next the ground of demurrer that the amended complaint does not state facts sufficient to constitute a cause of action: The statute under which this action is brought (26 Stats. at Large, 209) provides:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. * * *

"SEC. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

83 "SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any Territory of the United States, or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal."

Defendants counsel rely upon the case of Anderson against The United States, 171 U. S. 604, as supporting their demurrer upon this point. The bill in that case was filed under the direction of the United States Attorney General by the United States district attorney for the western district of Missouri. It is alleged, among other things, that defendants "have unlawfully entered into a contract, combination, and conspiracy in restraint of trade and commerce among the several States and with foreign nations in this, to wit, that they have unlawfully agreed, contracted, combined, and conspired to prevent all other persons and members of the Traders' Livestock Exchange as aforesaid from buying and selling cattle upon the Kansas City market at the Kansas City stock yards, as aforesaid; that the commission, firm, person, partnership; or corporation to whom said cattle are consigned at Kansas City as aforesaid is not permitted to and cannot sell or dispose of said cattle at the Kansas City market as aforesaid, to any buyer or speculator at

the Kansas City stock yards unless said buyer or speculator
84 is a member of the Traders' Livestock Exchange, and these defendants (and each of them) unlawfully and oppressively refuse to purchase cattle or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle from any speculator of the said Kansas City stock yards who is not a member of the said Traders' Livestock Exchange; that by and through the unlawful agreement, combination, and conspiracy of these defendants the business and traffic in cattle at the said Kansas City stock yards is interfered with, hindred, and restrained thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the States and Territories aforesaid to the Kansas City stock yards." Mr. Justice Peckham, in the course of the opinion of the court, says:

"The agreement now under discussion differs radically from those of United States *vs.* Jellico Mountain Coal & Coke Co., 46 Fed. 432, United States *vs.* Coal Dealers Association of California, 85 Fed. 252, and United States *vs.* Addyston Pipe & Steel Co., 85 Fed. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer, and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration, that they form no basis for its decision. This association does not meddle with prices, and itself does no business. In refusing to
85 recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing-houses at Kansas City, and also of the various commission merchants who are constantly buying on orders and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of cattle for sale is therefore furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof."

The allegations of the amended complaint in the present case are that the members of the Tile, Mantel & Grate Association have conspired and combined to raise the price of tiles, mantels, and grates; to control the output, and to regulate the price of these commodities, with the intent of monopolizing the trade and commerce between the other States and California, in regard to such commodi-

ties, as well as to arbitrarily fix their prices independent of
86 their natural market price. It will be seen, therefore, that the case of Anderson *vs.* United States cannot be considered as applicable to the case at bar.

The case of the United States *vs.* Jellico Mountain Coal & Coke Co., 46 Fed. 432, is more in point. The action was brought under the anti-trust act against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville and to change the same from time to time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined two cents per bushel and ten dollars for the first offense, and four cents per bushel and twenty dollars for the second offense. Owners or operators of mines were not to sell or ship coal to any person, firm, or corporation in Nashville who were not members of the exchange, and dealers were not to buy coal from any one but a member of the exchange. The court, commenting upon the agreement of this association of coal dealers, said:

"This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange; whereupon the prices of coal could be fixed absolutely, and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that
87 market to a large extent at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intention of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute, and there is no need of authorities to sustain such view of the case."

In the case of The United States *vs.* Coal Dealers' Association, 85 Fed. 252, the bill alleged that defendants comprised all the wholesale dealers handling coal in San Francisco, and that they, together with certain retail dealers, had conspired with intent to monopolize the coal trade and commerce between British Columbia, Washington, and Oregon, to the extent of the coal used for domestic purposes in the city of San Francisco. It was said by this court in that case:

"But the agreement of the importers and wholesale dealers which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals by name, and it is this agreement and what may be accomplished under it by the combination, that it is to be considered, and not what it may be doing at any particular time."

In United States *vs.* Addyston Pipe & Steel Co., 54 U. S. App.

723; 85 Fed. 279, the United States began proceedings in
88 equity against six corporations engaged in the manufacture of cast-iron pipe in localities in Ohio, Kentucky, Alabama, and Tennessee. The bill of complaint charged the defendants with a combination and conspiracy in unlawful restraint of interstate commerce. It appeared that the defendants who were manufacturers and vendors of cast-iron pipe entered into a combination to raise the price of pipe for all the States west and south of New York, Pennsylvania, and Virginia, comprising some thirty-six States in all, and to carry out this combination the associated defendants entered into an agreement which provided certain methods of procedure in dealing with the public, whereby competition between themselves was avoided in the territory mentioned. The court, in an able opinion reviewing the whole subject of the law relating to combinations and contracts in restraints of trade, arrived at the conclusion that the association of the defendants was a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood under the act of July 2, 1890. The doctrine of that case is applicable here. The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that
89 such combination has been made with the intent of monopolizing trade and commerce between California and other States, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman act.

Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained.

Defendants also demur on the ground of uncertainty, contending that the complaint fails to show that defendants were engaged in interstate commerce, or that their acts directly or immediately interfered with interstate commerce, or in what manner plaintiffs have been damaged, or at all. Upon consideration, however, this ground of demurrer does not appear to be well founded. The allegations of the complaint are obviously free from uncertainty in these particulars, and this ground of demurrer must, therefore, be denied.

The demurrer of defendants will therefore be overruled.

(Endorsed:) Filed November 13th, 1899. Southard Hoffman, clerk.

90 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA *et al.*, Defendants.
No. 12698.

Opinion.

On order to show cause why a witness should not be directed to answer certain questions, etc.

Reddy, Campbell & Metson, attorneys for plaintiffs.
Linforth & Whitaker, attorneys for certain defendants.

MORROW, *Circuit Judge:*

This is an action for the recovery of damages alleged to have been sustained by the plaintiffs in that their business has been injured by the defendants having formed an association within the prohibitory provisions of the act of Congress of July 2, 1890, known as the "Sherman anti-trust act" (26 Stat. 209).

91 The case is now before the court upon an order to show cause why James J. Daly, one of the plaintiffs herein, should not be directed to answer certain questions propounded to him by counsel for the defendants during the taking of his deposition before the master in chancery of this court, and why he should not be commanded to produce certain documents called for by a *subpœna duces tecum* issued out of this court on March 7, 1900.

Plaintiffs' counsel objected to the questions which have been certified by the master, on the ground that they were immaterial, and sought to elicit testimony that would enable the defendants to ascertain what the evidence of the witness would be upon the trial of the case.

The amended complaint contains allegations as to the plaintiffs' financial position before and after the acts of the defendants complained of, and states specifically the injuries alleged to have been suffered in consequence of such acts. The answer of the defendants squarely denies these allegations. The issue is thus joined, and the burden is upon the plaintiffs to establish the truth of their allegations. The questions asked of the witness, to which answers were refused, were directly in line with the proof necessary to be established; and recourse to the books and papers called for by the *subpœna duces tecum* appears to be the only method of substantiating certain allegations of the complaint. The objection on the

92 ground of immateriality cannot, therefore, be sustained.

The affidavit upon which the notice to take depositions herein was based states that the depositions are to be used at the trial of the action. This statement has not been controverted, and upon the record now before the court there is nothing to warrant a

different presumption than the ordinary one, that the proceedings have been taken in good faith.

The witness is directed to answer the questions propounded by defendants' counsel, and to produce the books and papers required by the *subpœna duces tecum*.

(Endorsed:) Filed November 12, 1900. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

93 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,

vs.

THE TILE, MANTEL & GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Company (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Company (a Corporation), The Pittsburg Tile Company (a Corporation), The Trent Tile Company (a Corporation), W. W. Montague and Company (a Corporation), Bush and Mallett Company (a Corporation), The Star Encaustic Tile Company, Limited (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavener, Meir, and John Doe Stock and Richard Roe Stock, Partners Trading as John Stock Sons, Defendants.

Bill of Exceptions.

94 Be it remembered that this cause came on regularly for trial before the above-entitled court Friday, December 14th, 1900; plaintiffs were represented by J. C. Campbell, Esq., their attorney, and the defendants who had appeared in this action were represented by P. F. Dunne, Esq., and Walter H. Linforth, Esq., their attorneys. A jury was duly and regularly impaneled and the trial of the cause proceeded. The following proceedings and none other were had and taken.

WALTER B. WEBSTER, a witness called on behalf of plaintiff, after having been duly sworn, testified as follows: I reside at 416 Lyon street, San Francisco. I know the Tile, Mantel and Grate Association of California. I am its secretary and treasurer. I have with me the constitution and by-laws of that association. (The witness here produced the constitution and by-laws and the same were offered, admitted, and read in evidence, and are as follows:)

Constitution of the Tile, Mantel and Grate Association of California.

Preamble and resolutions.

The objects for which this association is formed are: To unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San

Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

95

Name.

This association shall be known as the Tile, Mantel and Grate Association of California. The territory in which its operations are to be principally conducted is within a radius of two hundred miles of San Francisco. Its principal place of business will be in San Francisco.

ARTICLE I.

Membership.

SEC. 1. Any individual, corporation, or firm engaged or contemplating engaging in the tile, mantel, and grate business in San Francisco, or within a radius of two hundred miles thereof (not manufacturers), having an established business and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, shall, after having signed the constitution and by-laws governing said association, and upon the payment of an entrance fee, as hereinafter provided, *shall* enjoy all the privileges of membership.

SEC. 2. All associated and individual manufacturers of tiles and fireplace fixtures through the United States may become non-resident members of this association upon the payment of an entrance fee, as hereinafter provided, and after having signed the constitution and by-laws governing said association.

SEC. 3. Membership in this association shall terminate upon the institution of insolvency proceedings or in the event of liquidation.

96

ARTICLE II.

Fees and Dues.

SEC. 1. The initiation fee of this association shall be for active members twenty-five dollars, and for non-resident members ten dollars, which amounts must accompany each application for membership.

SEC. 2. Each active member of the association shall pay ten dollars per year as dues, payable in advance on the third Monday in August of each year. No dues shall be charged against non-resident members.

SEC. 3. Any member who shall be in arrears for dues or any assessments for one year shall be notified in writing of such arrearage, and upon the failure to pay the same within one month after such notification he shall be stricken from the roll and forfeit all rights to membership and property of this association.

SEC. 4. Any member dropped from the roll for non-payment of dues or assessments desiring reinstatement shall be subject to the

same rules governing the admission of new member-, and in addition to the initiation fee the amount of his indebtedness to the association at the time of his expulsion shall accompany his application.

ARTICLE III.

Officers.

SEC. 1. The officers of this association shall be a president, a vice-president, a secretary, and treasurer (which latter two offices may be combined), and two directors all of whom shall be elected annually by ballot, and shall continue in office for one year or until
97 their successors be chosen. They shall constitute an executive committee. Three of them, as designated by the president, shall at any time form a conference committee.

SEC. 2. The officers elect shall be installed at the first regular meeting after the election immediately after the minutes of the preceding regular meeting have been approved.

SEC. 3. Elections to fill vacancies shall be conducted in the same manner as provided in section 1 of this article.

SEC. 4. Any officer elected to fill a vacancy may be installed on the night of his election.

ARTICLE IV.

Duties of Officers.

SEC. 1. The president shall preside at all meetings of the association and of the executive committee and appoint all committees not otherwise provided for. He shall have power to call the executive or conference committees together at such times and places as he may elect. He shall also call special meetings of the association whenever he shall deem that the interests of the association will be promoted thereby or upon the written request signed by two members in good standing. He shall sign all vouchers and orders on the treasurer after the same have been properly examined and signed by the auditing committee and perform such other duties as may hereafter be provided.

SEC. 2. It shall be the duty of the vice-president to perform the duties of the office of president in his absence or disability.

98 SEC. 3. It shall be the duty of the secretary to keep a record of all the transactions of the association and of the executive committee; to notify members of the time and place of meetings; to examine and after having been signed by the president and auditing committee, to sign all bills and present the same to the treasurer for payment; to conduct the correspondence of the association and to execute all such writings as he may be officially instructed or authorized to perform.

SEC. 4. It shall be the duty of the treasurer to receive all moneys of the association and deposit the same as directed by the association; to pay all bills when properly presented and certified by the president and to keep a correct record of receipts and disbursements, an abstract and statement of which he shall exhibit at each regular

meeting of the association or whenever called upon by the executive committee.

ARTICLE V.

Standing Committees.

SEC. 1. The president shall appoint an auditing committee of three, whose duty shall be to examine and certify to all bills against the association and examine all books and vouchers of the secretary and treasurer, certify as to the correctness of the same, and make a written report to the association at each annual meeting.

SEC. 2. It shall be the duty of the executive committee to examine all applications for membership in and report on the same to
99 the association; adjust as far as possible all differences between employers and mechanics and perform such other duties as may, from time to time, be delegated to them by the association.

ARTICLE VI.

Amendments.

All proposed alterations or amendments to this constitution shall be submitted in writing at a regular meeting and no action thereon shall be taken until the next succeeding regular meeting. Due notice of such alterations or amendments shall be mailed to each member at least one week prior to the meeting at which action is to be taken thereon, and such alterations or amendments must receive the approval of two-thirds of the active members of the association.

BY-LAWS.

ARTICLE I.

Meetings.

SEC. 1. The regular meetings of this association shall be held in the city and county of San Francisco, on the third Monday of each month.

SEC. 2. The annual meetings of this association shall be held in the city and county — San Francisco, on the third Monday of August of each year.

SEC. 3. Special meetings may be called at any time, as provided in article IV, section 1, of the constitution.

SEC. 4. Three active members shall constitute a quorum for the transaction of business.

100

ARTICLE II.

Resignation from membership shall be made in writing to the secretary, who shall report the same at the next regular meeting of the association, and no members shall be considered as having resigned unless he shall have paid all indebtedness to the association.

ARTICLE III.

SEC. 1. In cases where a member of this association shall have entered into a contract for tile, grate, or mantel work, and shall have performed, delivered, or set any part of the work under said contract, and by reason of disputes, liens, foreclosure proceedings, or failure of payments he shall not be able to complete the said contract, no other member of this association shall, directly or indirectly, supply or set any materials, or substitute therefor, unless the claims of the members having the contract shall have been settled, or upon his written consent; provided, the said member shall have notified the secretary in writing, stating all the facts and enclosing proof of said contract.

SEC. 2. When a dispute arises between the purchaser under foreclosure proceedings and the member holding the contract, as to a proper adjustment of his claim on said contract, the executive committee shall adjust the said claim upon the application of any member in good standing in the association.

SEC. 3. When disputes arise between a purchaser and a member, as to design, method of executing work or extras, the facts may be sent to the secretary, in writing, who shall immediately notify
101 the executive committee, giving them all the facts in his possession, and it shall be in their power to apply the same remedy as provided in section 1 of this article.

SEC. 4. Upon the receipt by the secretary of a written notice from a member, as provided in section 1, or on being directed by the executive committee, as provided in section 3 of this article, he shall make the proper entry in a book to be kept for that purpose, and immediately notify each member of the association, in writing, giving all the particulars in his possession.

SEC. 5. Where any question may arise between a purchaser and member of this association, as to the proper execution of any work, a committee of three shall be appointed by the president, at the request of the member, who shall pass upon the work in question, and if, in their opinion, the work has been properly executed, the said committee shall support the member as expert witnesses in case of litigation. If the committee decides that the work has been improperly done, it shall be done over at the expense of the contractor without further controversy.

SEC. 6. When a strike is ordered by the delegate or union on any shop a member of this association, the member may notify the secretary, who shall immediately inform the executive committee, who shall have power to order a stoppage of all work in every shop members of this association until the strike ordered by the delegate or union has been off and the men return to work.

102 SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the "Tile, Mantel and Grate Association" of California shall forfeit their membership in the association.

SEC. 9. Any member violating any of the provisions of these articles and found guilty of so doing shall forfeit his membership in the association.

SEC. 10. Any firm or corporation, a member of this association, or where the firm is composed of but one individual, may be represented at the meetings of this association by any member of the firm or officer of the corporation or by a person other than a member of the firm or officer of the corporation upon giving written notice to the secretary designating said representative, and any action taken by the representative shall be binding upon the firm, corporation, or individual that he represents.

SEC. 11. Any firm having an active member of this association who shall be unrepresented at three consecutive meetings of
103 this association without being excused shall be declared suspended and if unrepresented at six meetings shall be dropped from membership.

SEC. 12. No individual, firm, or corporation who are active members shall be allowed more than one vote on any question.

SEC. 13. Non-resident members shall have the privilege of debate but no vote.

SEC. 14. Any member who shall render himself unworthy of membership may be removed by a majority vote of all active members of the association.

SEC. 15. No member of any tile-setters' union or organization shall be eligible to membership in this association.

SEC. 16. Any alteration or amendments to these by-laws may be proposed at any regular meeting, but shall not be acted upon until the next regular meeting, and must be approved of by two-thirds of the active members of the association.

It was admitted that on the 23d day of August, 1898, the following corporations were non-resident members of the Tile, Mantel and Grate Association of California, namely: Columbia Encaustic Tile Works of Anderson, Indiana, United States Encaustic Tile Works, the Cambridge Tile Company, of Covington, Kentucky, the American Encaustic Tile Company of New York City, the Star Encaustic Tile Company of Pittsburg, Pennsylvania, the Trent Tile Company of Trenton, New Jersey, Maw and Company, of England, with their offices in Chicago, the Providential Tile Works of Trenton, New Jersey, and the Ohio Foundry Company.

104 (The witness, continuing:) All of the tile companies above mentioned manufacture tile outside of the State of California, and within the United States.

(It was also admitted that the tile companies above mentioned shipped tile, so manufactured outside of the State of California, to

merchants in the State of California, including the plaintiffs and defendants herein.)

Mr. CAMPBELL:

Q. Did the Tile, Mantel and Grate Association of California ever as an association issue a price-list?

A. Yes, sir. I beg your pardon—there was never any price-list printed.

Q. To what does this refer, then, in your by-laws? What price-list does it refer to when it says, "No dealer and active member of this association shall purchase, directly or indirectly, any tile or fire-place fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices"? To what list prices does that refer?

A. To a list price which we adopted.

Q. When did you adopt the list price?

A. Soon after the formation of the society.

Q. After the adoption of the constitution?

A. No, sir.

Q. Or before?

A. No, sir.

Q. Kindly furnish me a copy of that list price.

A. I have no copy of it.

Q. Where is it?

105 A. The manufacturers east at that time did not have a list price that was regular. Each manufacturer's list varied. The American people manufactured a large variety and different qualities of tile, and, with one or two exceptions, we adopted the list price as printed by them as our list price to sell, according to our by-laws.

Q. The American Tile Manufacturers had its place of business where?

A. Zanesville, Ohio.

Q. And manufactures tile there?

A. Yes, sir.

Q. This association adopted the price-list sent out by them?

A. With one or two exceptions.

Q. What were the exceptions?

A. The exceptions were on the price of floor tiles, which was listed on their list at twenty-eight cents.

Q. What price-list did you adopt for that?

A. Thirty-five cents.

Q. Their price-list was twenty-eight cents?

A. Yes, sir.

Q. Was that a separate adoption of the list of floor tile by this association, or did you adopt some other manufacturer's list?

A. It was a separate adoption. There was no other manufacturer that listed that that I know of.

Q. With the exception of the floor tile and the difference between

twenty-eight cents and thirty-five cents in the price-list, you adopted and sold by the list furnished and promulgated by this company?
A. Yes, sir.

The COURT:

Q. You said "with one or two exceptions." Were there any other exceptions besides that one.
A. I don't recollect of any now.

106 EDWARD S. LOWRY, one of the plaintiffs, was called, sworn and examined, and testified as follows: I live at 57 Tremont avenue, San Francisco; I am a tile-setter by trade and have been since 1881. I am now engaged in the business of mantels, tiles, and grates. I am a member of the firm of Lowry and Daly. That firm commenced business in 1897, I think, at 551 Brannan street. Before August, 1898, the business of the firm was taking orders for floors, mantels, tiles, and grates. Prior to August, 1898, the firm of Lowry & Daly purchased practically all their tiles used by them in their business from the Columbia Encaustic Tile Works of Anderson, Indiana.

I bought all the tile we used from the Columbia Encaustic Tile Company; I imported it all from the east. I gave the orders sometimes to Mr. Clark or Mr. Daly did, their agent; and he took the orders down and took a copy of them; a couple of orders, I believe, I telegraphed myself to the company. They shipped the tile from Anderson, Indiana, to San Francisco, when it was received. The freight was paid at the Southern Pacific Company, and we paid the Columbia Encaustic Tile Company for the tile. I think we had been engaged in transacting business with that company two years or two years and a half. In bidding for work I figured against Montague and Co., Bush and Mallett, Mangrum and Otter, Bennett and Schutte, Thomas Rigney, and all of those who are in our complaint. I came in competition with them on nearly every job I figured on; one or the other.

107 (The following letters and telegrams were then offered and read in evidence.)

ANDERSON, IND., *Apr. 5th*, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We beg to acknowledge receipt of your letter of the 30th enclosing New York exchange for $351.72. We have given your account credit accordingly. We have also given your account credit for all the discount except that on the 6 x 3 cream glazed, on which we have previously allowed you. You are surely entitled to no discount on this. Therefore this leaves a balance due us of $6.64. We invoice this 622 feet to you originally at $132.95, on this we allowed you Feb. 14th, 10c. per sq. ft., or $62.20, therefore we only charged you on this 622 ft. $70.75. In making you the allowance of 10c. per sq. ft. this covered all discount and made the $70.75 the net amount due us. You have deducted the discount on

$132.95, the original amount at which we invoiced the 622 feet. You will readily see that you are clearly not entitled to the discount of 5% on this 622 feet. We make this explanation in full so that you may readily understand it. *The* request that you send us New York exchange by return mail for $6.64 so that we can clean up the old account. In making this settlement with you we think that we have treated you more than fair, although you state in your letter that you do not think that we are treating you fairly. Our terms to you were 50, 10 and 5 with an additional 5% for 30, 60 and 90 days' payments. You have permitted the bulk of your account to run over 90 days before remitting us. This is
108 clearly in violation of the terms made you. However, in order to get the matter settled, we have decided to grant you the full amount of the discount, with the exception of the $6.64 explained above.

In order to do away with these partial payments, we have decided to make you the following discounts and terms—50, 10 and 5% discount, with an additional 5% for cash within 45 days from date of invoice. This gives you a chance to receive the goods and allow you 30 days' time after receiving them, and makes the payment one payment instead of three partial payments. We desire you to advise us by return mail, stating that you accept these terms. Considering all the circumstances we think that we have made a fair settlement with you, and the terms we make you, *i. e.* 5% for forty-five days' payment are better than we are making any of our customers in the East where competition is fully as strong, if not stronger that it is in the West.

As previously stated to you, we will be ready to ship the Duffey job on Apr. 11th, it may be the 11th before we are able to get the car off, but we think that the car will surely go forward on the 11th, as per our promise to you.

Awaiting your further favors, and prompt reply to this letter, we are,

Very truly yours,

THE COLUMBIA ENCAUSTIC TILE CO.
GEORGE LILLY, *Treas.*

109 ANDERSON, IND., *Apr. 20th*, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We acknowledge receipt of your letter of the 14th and thank you for small remittance, regular receipts for which we beg to inclose herewith. We note that you accept the terms and discounts that we named you, *i. e.* 45 days from date of invoice on all open shipments. But we note that you request 30, 60 and 90 days on car-load lots. We are perfectly willing to be lenient with you, and we think that we have been, but we request that you try to conform with our terms as named you, *i. e.* 45 days from date of invoice, even on the car-loads. If it is not possible for you to pay us on this first car-load within 45 days, pay us what you can

and remit the balance at the earliest possible day. But we request that you so arrange your business as to conform to our terms, as we have stated above. This will be satisfactory to us, and we will continue to extend you the credit asked for. In this connection we beg to state that we are extending you quite a heavy line of credit and in our doing so we are favoring you to quite a large extent, and for this reason you should try all the more to live up to terms.

Kindly give this matter your consideration, especially the large credit that we are granting you, and see if you cannot do as we request.

Awaiting your further favors, we are,

Very truly yours,

THE COLUMBIA ENCAUSTIC TILE CO.
GEORGE LILLY, *Treas.*

110

JULY 9TH, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We beg to acknowledge with thanks receipt of your esteemed favor of the 2nd, enclosing New York exchange for $600.00 regular receipt for which we beg to send herewith. We knew that there must be something wrong, or else you would have remitted us earlier. You will remember that we cautioned you concerning—mentioning a certain firm, whose name we have agreed not to put in here, because it does not affect the case one way or the other. We found out from our investigation of them that they would bear watching closely. We would advise that you take no chances with them whatever. Neither you or ourselves can afford to lose any money by them. We know that just as soon as you get hold of the money that you will remit it to us, but we also knew that the source from which you expected to get the money with which to pay us was not altogether satisfactory. We granted you terms on this last car of 30, 60 and 90 days, and we would like you to pay us within these terms, as we are in much *in* need of the money. We can only say to you—do the very best you can and do not allow—blank—"to get you into this hole." Again thanking you for remittance, we are,

Yours truly,

THE COLUMBIA ENCAUSTIC TILE CO.
GEORGE LILLY, *Treas.*

111

AUGUST 17TH, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

DEAR SIRS: We have your favor of the 11th inst. enclosing New York draft for $260, which we pass to your credit. We note that you state that this is in full of account to date. Our books show that you owe us to August 31st $326.04. We will refer this matter to our book-keeper, who is away today. We presume you are in error in stating that this is in full of account to date. We will continue to make your shipments Pan Handle C. & N. W. & Union

Pacific per your recent instructions until you advise us to the contrary. We send you herewith the original B./L. for our shipment to you of June 14th one vestibule.

Yours truly,

THE COLUMBIA ENCAUSTIC COMPANY.
H.

BOH.
CNE.

AUG. 23RD, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We beg to advise you that we have become a member of the Tile, Mantel & Grate Association of California. We do not know whether you are members of the same or not. We have a copy of the by-laws here, which probably give us a list of the members, but the same happens to be locked up in Mr. Lilly's private drawer, and he is away on summer vacation. We trust, however, that you are members, and if not, we request that you
112 join the association, if you can see your way clear to do so.

We believe that this will be a good thing for all parties concerned, and cons-dering the volume of business that your company has been doing, we do not see why you should not be able to hold your own in the association. We shall be glad to hear from you on the subject, whether you are members or not. We will, of course, complete your unfinished orders which consists of 500 ft. of 6 x 2 cream. One-half of this will be forwarded to you today, balance within the next few days. This will complete all of the orders we have from you.

As for the future, as long as we are members of the association, we will of course be compelled to confine our sales within the association.

Awaiting your valued reply, we are,

Yours truly, THE COLUMBIA ENCAUSTIC CO.
H.

BOH.

SEPTEMBER 3, 1898.

The Columbia Encaustic Tile Company, Anderson, Indiana.

GENTLEMEN: We acknowledge receipt of your communication, wherein you refer to the California Mantel, Tile & Grate Association. You ask me if we are members of the same, and if not, you request us to join. You further inform us that you are members of the above-named association, and unless we become members of the same, that you cannot sell us any more tile. In reply
113 to your letters, we beg to say we were entirely astonished at the tenor of your communication. We have given you our trade to the exclusion of all others; since we have been in business, we have paid your bills promptly. We have made a fight for your goods, when our competitors were doing all in their power to force you out of the market. The tile-work in

the Emma Spreckles building has been held up as a sample of the tile you turn out. We have been obliged to overcome a great deal of unfavorable comment in handling your goods, but we have made your fight, and that, too against big odds. However, we have succeeded in convincing the public that the Columbia Encaustic Tile Company made merchantable goods. Let the volume of our business we have given be the answer. That you have in days gone by been our friends, we frankly admit—I guess you can read that better than I can, perhaps, Mr. Daly. We embrace this opportunity to say to you that we fully appreciate the favors you have extended to us, and we embrace this opportunity to say that we have given you our entire trade. In return for our loyalty, we are now met by a request from you to join an association, or we cannot buy any more goods from you. Who this association are, or what they are, we do not know. You say that you have a copy of the by-laws locked up in Mr. Lilly's private drawer, and he is absent on his summer vacation. This being the case, it is fair to presume you cannot impart the information as to what the association is. We would be pleased to be enlightened on this subject when Mr.
114 Lilly returns home. In the meantime we respectfully request that you ship us as fast as possible all orders we have sent to you, either direct or through your agent, Mr. Clarke, up to the present time. If the association you refer to is a combination or trust of combined firms to control business to the exclusion of others, it would preclude the possibility of our joining it, for the simple reason our courts have recently decided a case against the coal association which makes it a crime to enter into any combination and deprive any one from doing business. We are law-abiding citizens, and take pleasure in saying that we stand well in this city. We do not owe a dollar, except for goods that are in transit. The builders of San Francisco have been very friendly to us in the way of patronage. If there has been any association, combination, etc., formed that will hamper our business in any way, we are willing to go before the people of San Francisco without grievances. In conclusion permit us to say the people of San Francisco are liberal-minded, just, and fair as a rule, and would stand by any honorable house that any combination were trying to grill.

Yours respectfully,

LOWRY & DALY.

AUG. 26TH, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We are in receipt of your telegram as follows: "Ship immediately 300 sq. ft. 6 x 1 ½ color 18, opera blue. 300 sq. ft. 6 x 1 ½ color No. 74, mottles umber. 300 sq. ft. 6 x 3 cream glass."

115 We book this order and will ship same as soon as possible. Will have to put in through the enamel kilns and will not be able to ship until about the second week of September.

We wrote you several days ago about the tile dealers' association. As stated in that letter, we do not know whether you are a member or not, but as you have not had time to receive our letter on the

subject, we will book this order, as we know that you have been buying of us and are depending upon us. After receipt of our letter on the subject, of the association, we will not be able to book further orders from you unless you are members. We trust that you are members and if not, we urge you to join.

Thanking you for the order and awaiting your further favors we are,

Yours truly,

THE COLUMBIA ENCAUSTIC TILE CO.
B. O. H.

BOH.

AUGUST 31ST, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We this day have telegram from Mr. C. H. Clarke, reading as follows: "Add to Lowry's telegram order six barrels 6 x 3 cream." In accordance with the above telegram, we enter your order for an addition 300 sq. ft. of 6 x 3 cream, making total amount of this size and color ordered by you 600 sq. ft.

Yours truly,

THE COLUMBIA ENCAUSTIC TILE CO.
J. C.

116 ANDERSON, INDIANA, *Sept.* 1, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

DEAR SIRS: Referring to your order for six barrels 6 x 3 cream, per your telegram of the 31st ulto. sent in by Mr. Clarke, we have looked this matter up and find that you have had time to receive our letter of the 23rd inst. in regard to association matters, and as stated in that letter, we cannot book any more orders from you after you have received our letter of the 23rd, unless you are members of the association. We are awaiting to hear from you on the subject. The order above referred to was acknowledged yesterday without giving the matter proper consideration.

Yours truly,

THE COLUMBIA ENCAUSTIC TILE COMPANY.
H.

No. 26 sent by D. Received by C. 18 paid. Received at 5.20 p. m. Sept. 22, 1898. Dated Anderson, Indiana, 22. Lowry & Daly, 551 Brannan street. We decline to book your orders after August 28th including car-load as written you August 23rd.

THE COLUMBIA ENCAUSTIC TILE CO.

SEPT. 26TH, 1898.

Columbia Encaustic Tile Co., Anderson, Indiana.

GENTLEMEN: We received your telegram stating that you cannot book any orders for us dated after the 28th of August last. In reply, we beg to say, we think your actions toward us are unjust, unfair and uncalled for, after doing business with you for years, to

117 the exclusion of all other tile manufacturers, and paying your bills against us promptly, you deliberately turn us down without a word of warning and refuse to sell us any more tile without we join an association that you are members of. You do not enlighten us as to what this association is, who they are, or anything about it. But simply say join this association or you cannot buy any more tile from us. You do not seem to realize that we handle no other tile except yours, and in the course of our business taken contracts that we are obliged to complete, that call for your tile. All of a sudden you spring on us a demand that we must become members of an association or cease to do business with you. You did not extend to us even the common courtesy of saying, Gentlemen, we have joined an association, and unless you become members of the same we cannot do business with you, but we will give you time to order such stock as you may require to complete any contracts you have on hand. That was the least you could have done to have been honorable with us. Your conscience must be very elastic if you can reconcile it to your treatment of us. In conclusion, permit us to say, we insist on car-load order being filled in accordance with the contract with your agent.

Yours resp.,

LOWRY & DALY.

It was then admitted by counsel for defendants that "there is no dispute here that the members of this association, these manufacturers, would not do business that was the general purpose of the association, with the dealers who were not members of the association."

118 (Witness continuing:) I was ready and willing at all times during the year 1898 after August to conduct and carry on our business, and with the exception of being able to get tile was in the same condition to do so.

Q. Kindly state to the jury the difference in this market, you may take it by the square foot, between the list price and the actual price that was paid for tile by persons in the business that you were.

A. The list price at that time was fifty-four cents; I believe prior to September, 1898, we got fifty, ten, five and an extra five for cash.

Q. To how much in figures did that bring it per foot?

A. In the neighborhood of twenty-two cents a foot, I should judge.

Q. What has been the list price of tile, if you know, since September, 1898, in the market?

A. I believe the list price now is sixty cents.

Q. Have you had occasion to buy tile since you have been in business from the dealers here in San Francisco?

A. Yes, sir.

Q. Both before and after September?

A. Yes, sir.

Q. Can you state to the jury whether or not the price of tile to dealers like you has or has not been increased since August, 1898?

A. I bought tile for thirty cents a foot in this market prior to

1898, and thirty-six cents, and I paid fifty-four cents for it since then, a foot.

The COURT:

Q. Do you mean the same tile?

A. The same class of goods.

119 Q. Is that with the discount that you mentioned?

A. No, sir, that was not.

Q. You paid thirty cents net?

A. Thirty cents net, in this market.

Q. You said in your testimony that the price, with all the discounts, was twenty-two cents. What did you refer to then?

A. That was back east in the factory. This is in the local market. That what Mr. Campbell was asking me, as I understand — what I paid in the local market.

Q. Then you paid thirty cents?

A. Yes, sir.

Q. Before 1898?

A. Yes, sir; thirty cents, and I paid thirty-six cents to another firm. Thirty-six cents to one firm, and thirty cents to another.

Q. And since then, how much?

A. I think my bills will show that I paid fifty-four cents.

Q. Were those list prices?

A. Those were the prices here.

Q. List prices here?

A. Yes, sir.

Mr. CAMPBELL:

Q. How did you obtain this tile since the latter part of August, 1898, for fifty-four cents?

A. I bought it here.

Q. Now, was that the list price of the tile, or were you given your discount?

A. That was the list price of the tile, the factory list price. They sold at factory list prices here.

Upon cross-examination the witness, testified, as follows:

120 Mr. LINFORTH:

Q. Did you apply to any one of these tile companies that I have called your attention to (referring to several companies not members of the association) to supply you with that particular tile upon the refusal of the Columbia to do so?

A. I authorized Mr. Clarke right along to act for me, and the very minute he found the place I sent $1,000 east to buy tile. Our firm did not take any other means only that way. We thought we would be known, and would not get it. We got Mr. Clarke to act for us to get the tile and we told him we would send the money ahead, and there would be nothing about credit or anything else, and we did send $1,000 to the Mosaic Tile Company, and the Mosaic Tile Company for Mr. Clarke, and for us, got tile at the Beaver Falls, and

they filled the order, and from that on we bought from the Mosaic Tile Company and the Beaver Falls, and did not go any further. I told Mr. Clarke to write everywhere; we would think together; to try every factory that I thought it was possible to get it at.

C. H. CLARKE, a witness called for plaintiff, was sworn and testified as follows:

I was, in the latter part of August or the first part of September, employed by the firm of Lowry & Daly to secure tile for them. I wrote to the different tile manufacturers that I knew. I wrote to the United States Encaustic Tile Company of Indianapolis; to the Cambridge Tile Company of Covington, Ky., to the Star Encaustic Tile Company *Company* of Pittsburg, Pa., to the Maywood
121 Tile Company in New Jersey; to the Beaver Falls Tile Company; to the Mosaic Tile Company of Tanesville and two or three others the names of which have slipped my mind now. I think I received three or four answers.

(The following letters were then offered and read in evidence:)

SAN FRANCISCO, *Sept. 17th*, 1898.

Cambridge Tile Mfg. Co., Covington, Ky.

GENTLEMEN: The subscribed has been the representative for the Columbia Encaustic Tile Co., on this coast, for the past few years. Our arrangements were canceled on the 15th inst. It seems that there has been an association formed of eastern tile mfgs., and Calif., mantel and tile dealers.

It is possible that you are members of the association. If you are not members, are you free to sell dealers who are not members of the association? I could place two car-load orders at once with old customers of mine.

If you are in a position to sell such dealers I would be pleased if you would let me know at your earliest possible convenience, and also state the commission you would be willing to allow me.

Yours respectfully,

C. H. CLARKE,
551 *Brannan St., San Francisco.*

COVINGTON, KY., *Sept.* 23, 1898.

Mr. C. H. Clarke, 551 Brannan street, San Francisco, Calif.

DEAR SIR: Replying to your- of the 17th wish to state that we are members of the California Mantel, Tile & Grate Association,
122 and are not free to sell tile to parties who are not members of this association.

Regretting very much that we cannot be of service to you, we are,

Yours truly,

CAMBRIDGE TILE MFG. CO.

SAN FRANCISCO, *Sept. 28th*, 1898.

U. S. Encaustic Tile Co., Indianapolis, Ind.

GENTLEMEN: The undersigned for the past five years has been the agent for the Columbia Encaustic Tile Co., here. Our arrange-

ments were canceled on the 15th inst. owing to the association that has been formed of local dealers, and eastern manfts. of tile. Not knowing whether or not that you are members of said association. I kindly ask if you are so situated that you can sell dealers who are not members of the association? I have some old customers, and goods ones, too, not in the association. They would place an order for two cars at once. I would be pleased to hear from you. If you can give this communication favorable consideration, what commission would you be willing to allow me?

Very respectfully yours, C. H. CLARKE,
No. 551 *Brannan St., San Francisco.*

INDIANAPOLIS, IND., *Oct.* 4, 1898.

C. H. Clarke, San Francisco, Cal.

GENTLEMEN: Your favor Sept. 28th at hand and noted. We are at this time members of the association mentioned, and there-
123 fore feel that we should protect our regular customers. It is hard always to turn away an order and we hope we may be able in the future to take care of you. Could you not join the association and establish an office, then you could sell to whoever you wished, but we feel that the way trade has been in the past that the demoralized condition of same is due to parties bidding on work cheaper than it could be properly done, thus causing people to look with distrust on tile-work, as you are aware that the laying is the most important part.

Yours very truly, U. S. E. T. WORKS.
OGLE.

SAN FRANCISCO, *Oct.* 13*th*, 1898.

U. S. Encaustic Tile Co., Indianapolis, Ind.

GENTLEMEN: Your very kind letter came to hand by due course of mail, and has had a careful *personal*. In reply I beg to say. Thank you very much for the tone of your letter. You refer to the association that has been formed, and ask me if I could not get an office and join the same. I have the office all right. Your association is composed of man'f'rs and dealers only. As I stated in a former letter I have been the coast agent for the Columbia En. Tile Co. for the past five years, selling to the trade. Our arrangements were canceled on the 10th of September last. My customers were not taken into the association.

They were left out of the combination. They were not wanted.
When this happened I had no use for the Columbia Tile Co.
124 nor they for me. My customers have done the largest tile jobs that have come up in this city. I can give a list of architects and owners, and long one too, that will give these dealers that I refer to the very best of testimonials, as regards first-class work. And I know at the present time that these dealers, whose business the Mantel, Tile and Grate Association is trying to ruin, has the sympathy of the public in this city. I have heard many expressions of sympathy for these people from architects and

builders. I am satisfied in my own mind what the outcome of this affair will be. The average Californian likes fair play, and he generally stands in with the fellow that isn't getting it. The opportunity no doubt will be afforded to the building public to take sides. Years ago I had the pleasure of meeting your Mr. Landers. I believe him to be opposed to all trusts. He is good Democrat, or at least he was some years ago. If he was out here and investigated this affair, he would advocate selling the dealers I refer to. Again I thank you for your kind letter. I am sorry that you can't see your way clear to sell dealers outside of your association. Should you in the near future conclude to sell your tile to my dealers, that will pay for the same, I would be pleased to act as your representative to solicit trade. If you will send me within a short time a full line of your samples I can sell for you a car-load of 130 barrels, with a second car to soon follow. Trusting that I may hear from you at no distant day, I remain,

Very respectively yours,

C. H. CLARKE,
No. 551 *Brannan St., San Francisco.*

125

INDIANAPOLIS, IND., *Oct.* 19, 1898.

G. H. Clarke, San Francisco, Cal.

DEAR SIR: Your favor of Oct. 13th noted and we thank you very much for the same, and our Landers asks to be particularly remembered to you as still a "stalwart." Under present circumstances you will see and understand our situation, and we could not without cause honorably secede from the association. Should matters become entangled and the whole thing falls through, we would certainly desire to aid you, and will file your letter and keep the matter in mind.

Yours truly,

U. S. E. T. WORKS.
OGLE.

AKRON, OHIO, *September*, 1898.

Mr. C. G. Clark, San Francisco, Cal.

DEAR SIR: In response to your said inquiry of the 15th instant will say that we do not manufacture the articles you want. Thanking you for the inquiry, we remain,

Yours respectfully,

THE AKRON BRICK & TILE CO.

SAN FRANCISCO, *Sept.* 17, 1898.

Star Encaustic Tile Co., Pittsburg.

GENTLEMEN: Are you in a position to sell dealers who are not members of the California Mantel and Tile Association? The subscriber has been the representative of the Columbia Encaustic Tile Co. on this coast for a few years past. On account of the association alluded to, my arrangements was canceled on the 15th inst.

126 One of my old customers, not a member of the association, is in the market for a car-load of floor tile. If you are situ-

ated so that you can do business with the people I refer to, I would be pleased to have you notify me to that effect, and also let me know the commission you would be willing to allow me.

Yours respectfully, C. H. CLARKE,
551 *Brannan St., San Francisco.*

PITTSBURG, PENNSYLVANIA, *Sept.* 22, 1898.

Mr. C. H. Clarke, San Francisco, Cal.

DEAR SIR: Replying to your favor of the 17th inst., we beg to say our goods are handled in your city by W. W. Montague & Co., Bush & Mallett Co., and Bennett and Schutte, to any whom we beg to refer you for anything in the way of encaustic tile you may desire. Hoping you may be able to do some business with them, we remain,

Yours very truly,
STAR ENCAUSTIC TILE COMPANY.

(Witness continuing:) There were some of the people to whom I wrote who did not answer me. I was familiar with the business of Lowry & Daly from August, 1898, to January, 1899 to a certain extent; the first tile secured by them after August, 1898, when the Columbia Encaustic Tile Company refused to sell tile to them was in January, 1899, which tile they got at the same price as before.

From August to January they were writing letters to differ-
127 ent manufacturers. I wrote to the Beaver Falls Company and the Mosaic Tile Company some time in September.

JAMES A. DALY, one of the plaintiffs, was called, sworn, and testified as follows:

I am one of the plaintiffs in this action. I had ordered from the Columbia Encaustic Tile Company 173 barrels of tile, or 8,650 square feet, before I received the letter stating that they would not ship any more to us unless we were members of this association. Laid down in San Francisco, that tile would cost us twenty-eight cents and a fraction of a cent per square foot. The market price of tile of that character and quality in San Francisco was fifty-four cents. The first tile I received after the Columbia Encaustic Tile Company shut down on us and refused to ship us any more was on January 7th from the Mosaic Tile Company. I saw a letter purporting to come from the Mosaic Tile Company to Mr. Clarke. I wrote to them immediately after that and have the answers to the various letters which I wrote to the Mosaic Tile Company.

(The following letters were then introduced and read in evidence.)

ZANESVILLE, OHIO, *Nov.* 21*st*, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We have your favor of the 14th inst. and note fully its contents as also the contents of Mr. Clarke's letter received by same mail. We have wired you as follows: "Select quantities, color, designs by number both Beaver Falls and American. Your letter requesting us to get these glazed goods is so indefinite that we

cannot accept the responsibility of making the selection.
128 You speak of opera-blue majolica and majolica borders to suit the colors, and we are at a loss to understand what you mean. You have been getting your goods from the Columbia and they *may* design and colors designated in these terms, but we have no catalogue of theirs nor color-board, and you will readily see that it — essential for us to have definite and explicit instructions by number of color and design so that we do not make a mistake in purchasing the tile, which we have not tried to as yet, but believe we can, if not from the American, from the Beaver Falls? A rough estimate of the value of the tile as ordered by you would be $300 for our tile and in the glazed tile 42 bbls., about 2100 feet it would amount to the neighborhood of $600 body borders, caps etc. You do not give us any reference as to your financial worth, but say you will remit us a certified check as soon as the amount can be determined.

We are in the market for business and appreciate your order, but it is simply business for us to know that we are safe in extending credit and you will therefore kindly furnish us a statement of your business affairs with satisfactory references as a basis for future business dealings. We are willing to assist you in getting glazed goods and think we will have no trouble in getting them from some factory, but as we do not intend to make any profit, but are doing this as a mere matter of accommodation with the belief that our labors and kindness in this matter will make you true and loyal friends of ours. We must expect you to put up the money to purchase the same. We are sure you would not ask us to accept
129 the responsibility of such a purchase without the proper security being given us.

We realize fully the embarrassing position you have been placed in by the association, and shall cheerfully lend you all the assistance in our power to knock it out.

As to the goods in Mr. Funge's possession we will write both you and Mr. Clark more fully in a few days as soon as we hear from Mr. Funge to whom we have written for a report of stock on hand. Thanking you for your order and awaiting your early reply,

We remain, sincerely yours,

THE MOSAIC TILE CO.
W. M. CHINNICK,
Sec'y & Treas.

We think it well to treat this in confidence.

ZANESVILLE, OHIO, *Nov. 26th*, 1898.

Messrs. Lowry & Daly, 57 Tremont Ave., San Francisco, Cal.

GENTLEMEN: Your telegram ordering 110 bbls. glazed tile was duly rec'd and we have started negotiations to find out where they can be purchased and how soon we can get them delivered, but as written you in our last letter we do not want to bear the responsibility of making selection of colors, and designs, and we kindly ask you to furnish us those in more definite form than your despatch or

letter of 14th inst. gives. As these 110 bbls. represent some 6,000 ft. and with borders and different colored glazes would average somewhere near 30 cents per foot. Kindly send us your certified
130 check as proposed to cover the amount. You can readily determine this by taking a price-list and figuring it up as all the tile factories but ours have substantially the same price-list. Awaiting your early reply,

We remain, yours sincerely,

THE MOSAIC TILE CO.

ZANESVILLE, OHIO, *Nov. 28th*, 1898.

Messrs. Lowry & Daly.

GENTLEMEN: Your letter of the 22nd is rec'd and also your dispatch of this date as follows: "Mailed you thousand dollars also statement and endorsement letter." We regret very much that you have not made out a list of the sizes of strips, caps, etc., you wish so that there could be no mistake in ordering the tile; we do not know what you mean by opera blue as we do not find it in the American list nor do we understand what you mean by majolica. The only thing under the head of majolica tiles in the A. E. T. Company price-list are a few 6 x 3 designs quoted at from 1.70 to 2.25 per square foot, and we feel sure you do not want these, so that it seems necessary that you make out a list of the sizes and the kinds, whether strips, caps, corners, etc., even if you do not give the number of color. If you will designate the color we could probably select as we have color-boards of three companies in this office. You have ordered something over 5,000 feet glazed tile, if you count 100 bbls. (we made the count 110 bbls.) and this amount of tile cannot be gotten at any factory for some time, as it takes time to get through the kilns, and our order would have to
131 take its place and order with others. We now have an order in at the America, that we placed through a local dealer Oct. 31, and will not get it until Dec. 1. In this connection it would seem to be the proper thing to impart confidentially a little information which will explain the situation. The promoters and organizers of this company, Mr. H. S. Mueller & Karl Langenbeck were formerly in the employ of the A. E. T. Co.—the former for ten years as designer and the latter for three years as chemist, and he is a chemist of international reputation. When they left that company to organize this a bitter feeling was shown by the president, Mr. Fischer and this company through that has been subject to many indignities and business discourtesies. We at one time purchased glazed tile and finally an order came to not sell us any, and lately if we had to have their goods we were compelled to buy them through a local dealer here.

About ten days since we were approached by their vice-pres't, Mr. Hoge, who is on terms of personal friendship with all the members of this company, to agree to a schedule of prices and maintain them. We informed him of the treatment we had rec'd and stated to him that no business arrangements could be had with us until we were put on at least the basis of their best customers and given

as many discounts? Mr. Hoge has now gone to New York to confer with Mr. Fisher and his son-in-law Mr. Kohler, who is the business manager, and we expect to know the result of our ultimatum in a few days. Meanwhile we have sent out to other factories to learn how soon we can get the tile.

132 These things all take a little time but we wish to assure you we are making our best efforts to help you—and shall not leave a stone unturned to accomplish this end.

The foregoing was written last evening, but as I could not get it finished in time for the mail, I deferred the writing until this morning. Have just rec'd Mr. Clark's letter of 23d, and thank you for the *kindly — expressed* thro' him.

We are on very friendly terms with the Cambridge Tile Co. in fact their supt. was here a few days since to get some instructions from our Mr. Langenbeck as to the making and burning of glazed wall tile, and also with the U. S. but both these companies are members of your association and we would have to get them to ship it, its destination would be divulged and they would most likely refuse to sell it to us, knowing it was to be used in your city.

But if we can get it from the American, we can have the title delivered to us and we can ship it to where we please.

We expect a letter today from the Beaver Falls Co. who make a very nice line of glazed goods, as to whether they can furnish the tile and how soon they will be able to do so.

We can ship the tile we have at any time. We have in stock all the tile you ordered of us except the 5 bbls. 3 " oct. buff, 1 bbl. 1½ x 1½ black, and 3 bbls. 3 " oct. red. We have not as yet made any octagons in any other color than white, and those buff and

133 red we would have to purchase. Will have to close to catch the mail. Kindly let us hear from you.

Very truly,

THE MOSAIC TILE CO.,
Per W. H. SHINNICK, *Secretary.*

ZANESVILLE, OHIO, *Dec. 5th*, 1898.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: Your valued favor enclosing check for $1,000 was rec'd on Saturday and your dispatch, both during the absence of the writer from the city. We had hoped before this to have been able to make arrangements for the purchase of the tile you rec'd from the American Tile Co. so as to be able to ship all at one time, and in one car. As previously written you of our interview with Mr. Hoge the vice-president of the American Co. we wished to know if that company proposed to sell us goods. Mr. Hoge is still in New York, but we have heard that the American U. S. and Columbia have agreed upon a price-list, and are not trying to get other manufacturers to agree to it, although no proposition has been made to us. The writer was in the "Star" Co.'s office in Pittsburg Saturday and there learned of this, and as the "Star" is a member of the association in your city, I did not approach them on the purchase of the buff, red and black octagons which we have never made. They have always asked more for their common tile than either the

American, Columbia or U. S. We note the prices at which you have been getting tile from the Columbia for the past three years.

134 Pending the return of Mr. Hoge we made inquiry of the Beaver Falls Co. on the wall and enameled goods, and their best quotation to us 50, 10, 10, 5 for spot cash. As this company is the only one west of Philadelphia that does not belong to your association, we will have to make the purchase from them, in all probability? In our correspondence with them we have not stated for whom the tile is wanted, but have left them to infer that we wished to use in our own contracts.

Should we purchase from them it will be necessary for us to make our shipments to them, and let them ship all together, or make separate shipments of what we can send. Aside from the buff, red & black octagons which we have never made we have all the tile ordered in stock, except the 1½ x 1½ black and we are now making them. There is a tile factory in Old Bridge, N. J. that makes enamels but from what information we have they ask and get higher prices and most of their product is sold in New York—the same may be said of the Maywood N. J. Tile Works. We will do the best we possibly can, and shall give you every advantage that we can possibly obtain not desiring anything for our services, but glad of an opportunity to make friends that will be some benefit to us. We note the guarantee of Mess. Hinkle & Reichling, and their *accommendatory* certificate is very complimentary to you. We shall do our utmost to get the tile shipped at as early a day as possible, and on the most favorable terms.

Very sincerely yours, THE MOSAIC TILE CO.
W. M. SHINNICK,
Sec'y & Treas.

135 ZANESVILLE, OHIO, *Dec. 7th*, 1898.

Mess. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We wired you this morning as follows: "Bought the Beaver Falls fifty, ten, ten and five discount," ship this month which we hereby confirm. We have never before been able to get but 50, 10 & 5 for cash from this firm, but in the fight that is going on in the east against The American we have been their fast friends having purchased considerable tile from them for our own contracts and when they quoted us 50, 10 & 5 it was because of the size of the order, and more in appreciation of our help to them that they quoted the above discounts. In my special trip to Beaver Falls last Saturday to make arrangements to get these tile, I tried to get better figures. Mr. Walker assured me he could do no better, that he had not sold at this price to any except one or two of their special customers who * * * (page missing) * * * as rec'd we will, have to take some measure to get this matter settled, as the longer it goes the more complicated and annoying it will become. If you have anything in sight that would use any part of these goods an inventory of which you have, kindly advise us or if you can make any suggestion that will enable us to adjust this matter without our

making a trip there we will be under great obligations to you for the same.

We appreciate very much the kindly interest you have shown us.

136 We have sent to you prepaid as per inclosed B/L. a half barrel of samples of inlaid and vitreous tile, among which are some aseptic tile which Mr. Clarke wrote me that an architect desired to see for hospital use. Kindly let Mr. Clarke have what he may need.

Our Mr. Langenbeck has been off for the past twenty days on his wedding trip, and Mr. Mueller met with an accident that laid him up for three weeks; so we have been pretty closely crowded.

Truly,

THE M. T. CO.,
Per SHINNICK.

STEUBENVILLE, OHIO, *March 7th*, 1899.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We are in receipt of a letter from Messrs. Montague & Co. of your city stating that we are selling outside of the association, viz: to you. We will not say that we cannot sell you in future and we want you to be careful not to say that you can buy from us and also we wish you would join the association, not that we care anything about the San Francisco association but they can bring things to bear upon us in other associations which might cause us considerable trouble. We wish you would let us know if there is any reason for not belonging to the association. If they do not seem to favor your admission we will take care of that part of it, or if you do not care to join we wish you would reconsider it as it might eventually force us into a position where we could not fill your orders.

Yours respectfully, THE OHIO FOUNDRY CO.

Dic. A. B. S.

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STEUBENVILLE, OHIO, *May 29th*, 1899.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: We are in receipt of your order of the 23rd for which please accept our thanks. Before shipping however, we write to ask you what arrangements you have made in regard to the association since we last corresponded with you. We have heard nothing more in regard to the matter, and in the meantime all the associations in the United States have combined under a head, and to be candid, if we get into trouble with the San Francisco association it may hurt us with all the other associations in the country.

We hope you have joined, but at any rate let us hear from you, and oblige,

Yours respectfully, THE OHIO FOUNDRY CO.

Dic. A. B. S.

STEUBENVILLE, OHIO, *June 12th*, 1899.

Messrs. Lowry & Daly, San Francisco, Cal.

GENTLEMEN: Answering yours of the 5th we have taken up the matter of the association with different people in San Francisco and they claim that they are only too willing to have you join their association. If this is the case we cannot sell you until you become members. It is not that we have any fear of the San Francisco dealers, but for the damage they would do us all over the country as they now have a national association, and we strongly advise you
if it is a fact that you are able to join the association in any
138 way to do so, and wire us if you can make such arrangements and we will ship your orders at once.

Yours respectfully, THE OHIO FOUNDRY CO.

Dic. A. B. S.

After the receipt of these letters from the Ohio Foundry Company we did not purchase any grates from them, not after they canceled our order. We sent them an order and they refused to ship. We had been dealing with them since 1896. We then asked Mr. Clark to write which he did, and we got grates from the Miller Grate Company, August 8th, 1899; the refusal was in May. We paid $1.20 more for the grates which we got from the Miller Grate Company then we did for those from Ohio Foundry Company. The Ohio Foundry Company's grate was a better grate and a cheaper one. We have purchased about 400 grates since we commenced to deal with the Miller Grate Company.

Further testimony was introduced from which it appeared that between the month of July, 1898; and the month of January, 1899; by reason of the fact that certain manufacturers of tile above mentioned, whose factories and place of business was out of the State of California, but within the United States, declined and refused to sell unset tiles to plaintiffs, whose place of business was within the State of California, because such manufacturers were and the plaintiffs were not members of the Tile, Mantel and Grate Association of California, plaintiffs were damaged in the sum of five hundred dollars.

139 W. B. WEBSTER, a witness called, sworn, and examined on behalf of defendant-, testified as follows:

The local members of the Tile, Mantel and Grate Association are composed of dealers in tile and the non-resident members are composed of the manufacturers.

The manufacturers pack the tile in barrels and ship it to the dealers as material to construct something of—to build on the walls or complete some work with.

Until it is so used, it is called unset tile.

By the expression "unset tile" we mean tile as a commodity, which has not been put in the place where it is designed to be used, just the same as brick, before it forms part of a building or cloth before it was made into clothes.

The commerce or trade between the manufacturer in the east, and the dealers in San Francisco is in unset tile.

Unset tile is very seldom sold to a consumer in this market.

When tile is placed either on the floor or the wall, it is called set tile.

At the time the Tile, Mantel and Grate Association of California was formed; the dealers in California were buying unset tile from the manufacturers; and the tile traded in between the dealers and the consumers in California was set tile placed in the building complete.

Q. I call your attention to the by-laws of the association. Section No. 7: "No dealer and active member of this association shall purchase; directly or indirectly; any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufact-
140 urer not a member of this association neither *that they shall* sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association." I will call your attention more particularly to this portion: "Neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices, to any person or persons not a member of this association." Mr. Webster, you have described here what unset tile is. I wish you would explain again the meaning of "list prices." What does that term mean, "list prices," as applied to unset tile? Make that as plain as you can to the jury.

A. It would apply to any list that the association might adopt, at which they would sell unset tile to parties not members of the association, or members of the association, if you will, as well.

(The witness continuing:) The expression, "fifty, ten and five, and five off for cash," means a discount off the list which they have issued. To illustrate: If the Columbia Encaustic Tile Company had a list, for example, tile $100 per barrel—a barrel of such tile sold to you would cost you $100, 50 per cent off, then 10 per cent off that, and 5 per cent off further, and if you paid cash, an additional 5 per cent off. The original price at which the manufacturer in the east sell his goods, and from which the discounts are taken, is the list price. At the time of the formation of the association this list price was not of a constant and uniform quantity—that is, the same quantity or same discounts for each manufacturer—there was a variance in the price-list among the manufacturers. The
141 list price above referred to is not the list price that is referred to in section 7 of the by-laws—that section refers to our list price. We adopted that list price at the time of the formation of the by-laws, and in doing so, with some changes, we adopted the list price of the American Encaustic Tile Company. This was done as a matter of convenience. This association was former in July, 1898.

Q. Prior to July, 1898, and prior to the formation of this association, I will ask you, to what extent and under what circumstances the dealers here, in the territory covered by these by-laws dealt in unset tile? To what extent did they trade themselves in unset tiles in this territory?

A. Do you mean buying from each other unset tile?
Q. Yes.
A. In relation to the quantity of set tile that was sold?
Q. Yes.
A. Less than one per cent. of the total is sold unset.
Q. Then I understand you that the amount of business in unset tile would be only one per cent.?
A. The amount of business that we did—that our firm did (meaning W. W. Montague & Company).
Q. At the time that the association was formed, and between that time and the 9th day of January, 1899, during those four or five or six months, what was the percentage of unset tile as related to the tile business in this territory? What was the percentage of unset tile dealt in here, exclusive of the dealers who were members of
142 the association? What amount of percentage would that come to?
A. It is so little, we could hardly state it.
Q. From the time of the formation of the association in July, 1898, down to the 9th day of January, 1899, were you operating under the constitution and by-laws read in evidence here?
A. Some of the provisions we did not carry out.
Q. Which provisions do you refer to?
A. Our constitution and by-laws call for an initiation fee of $25 to resident members. We reduced it to $10. We did not adhere to the provision calling for $3,000 worth of stock on hand. That provision was never enforced.
Q. At the time that this association was formed, and from that time down to and inclusive, say of the 19th day of January, 1899, how did the price of unset tile, as made by the manufacturers who were not members of the association, manufacturers in the United States, how did those prices compare with the prices made at the same time, during the same period, for the same commodity, by manufacturers who were members of the association?
A. The quotations to our firm were the same.
Q. Now, Mr. Webster, what effect upon the prices made by non-manufacturers of tile, during the period covered by my last question, what effect was there upon those prices, so far as the rate of freight or transportation were concerned from different places at which the factories were located?
143 A. The rate of freight from the different factories was virtually the same. The factories would give us a rate of freight to Chicago or other points, which would equalize the rate of freight from near-by factories.
Q. Referring again to this expression "list prices," used in section 7 of the by-laws, with reference to unset tile, was there ever any list price, or any price of any kind, made by the association as a body, in California or elsewhere, with reference to set tile for the consumer?
A. No, sir.
Q. Was there ever any price, any list price, or any price of any

kind, made by the association as a body, for unset tile as between manufacturers and the dealers?

A. No, sir.

Cross-examination:

The association was formed for the benefit of all the tile dealers, it being our expectation to have them all join. We had a provision in our by-laws to try and force people to join the association—that is, if they were not able to buy tile from other factories they would then come in to the association with us. The idea was if they could not get tile from other factories—that provision would bring them in with us, and being all together we could do better work and accomplish the object of the association better. Otherwise, I cannot say how we were going to force them to join.

Q. Was it not by reason of charging them the list price fixed by the American Tile Company which you changed from twenty-eight to thirty-five cents a foot in one particular?

144 A. No, sir; because there is so very little of unset tile sold that that would be no object at all.

(The witness, continuing:) We expected to get the plaintiffs to join, as there were provisions in the association that were for their benefit, and we hoped that they would join—one of the provisions was that they would agree to buy from the people who joined the association, and agree not to sell to any one who did not belong to the association, except for list price

Following your illustration, if the plaintiff had a contract to tile the floor and sides of the Fisher opera-house and could not get tile from the east by reason of this association, and came to me for it, I would charge them the price established by the American Tile Company for all except the floor tile, and for that I would charge them thirty-five cents.

Before the formation of this association, the unset tile that was sold to the consumer was about one per cent. of the set tile sold. I draw a distinction between a consumer and persons doing business such as Lowry & Daly. There are a number of persons doing business like Lowry & Daly in San Francisco, outside of the association. McGary was one. There were also others at the time of the formation of the association, but some of the parties have since joined the association. There is a person by the name of Wills in Oakland who is not a member, but I don't know the person you refer to as Lowenberg or Strongberg, I don't remember of any other parties in the same business as Lowry & Daly who are not

145 members. After the formation of the association the sale of unset tile to consumers was practically abandoned.

Q. You said it was so little that there would be no mention made of it?

A. Yes, sir, to consumers.

Q. Was not that the direct effect of the raising of the price by your association to the consumer?

A. No, sir.

Q. After the formation of the association, and the adoption of

the list price of the American Tile Company by your association, that did raise the price of tile in this market, did it not?

A. Yes, sir, it raised the price. The eastern factories raised the price also on us. The price was raised twice since that time on us—that is, not the list, but the discount. They are less today than they were at that time—that is, the factories from whom we buy and other factories also notified us of the raise.

Q. These two provisions of the constitution, which you say were not enforced, the $3,000 provision and the $25 provision being changed to $10, they were all of the provisions that had not been enforced of this constitution?

A. I think so.

Redirect examination:

I stated in answer to a question that the percentage of unset tile sold to the consumer was about one per cent. and after the association was formed, it was even less, and by consumer I mean the dealer and not the man who used it in his house.

146 Q. You have been asked here as to a statement made by you that the rates or prices were substantially the same among all the manufacturers. I understand you to say they had changed from three or four times since the association was formed?

A. Yes, sir.

Q. But at any one time, at any one given period of time, take any day, any week, or any month, was there any substantial difference among the manufacturers in the ruling prices, for any given point of time, whether they were members or non-members of the association?

A. No, sir; not that I know of.

Recross-examination:

There was a change in the prices of some of the factories in 1898—I don't know the date—the change was in the discount and it is the discounts on the list price which affects the real price of the tile.

This change diminished the discount and made the price of tile somewhat higher.

Members of the association had to pay that higher price—I presume they did; we had to.

(The following circular letter sent by Mr. Webster to various eastern tile manufacturers was then offered and read in evidence.)

147 **Tile, Mantel & Grate Association of California.**

President, H. T. Bush, of Bush & Mallett Co.
Vice-pres., A. S. Mangrum, of Mangrum & Otter Co.
Sec'y and treas., W. B. Webster, of W. W. Montague & Co.
Directors: J. H. Schutte, of Bennett & Schutte; T. F. Rigney, of T. F. Rigney.

SAN FRANCISCO, *July 26th*, 1898.

Providential Tile Works, Trenton, N. J.

GENTLEMEN: Owing to the state of the tile, mantel & grate trade of this city and vicinity for the last year and to its increasing demoralization, it has become necessary for the legitimate dealers (if they wish to continue in business) to form an association for self-protection. For the above reasons, and recognizing the fact that irresponsible workmen have been able to take several large contracts lately at prices at which it would be impossible for legitimate dealers to compete with, an association has been formed in San Francisco and immediate vicinity, of all regular dealers in the above lines to advance the interests of the tile, mantel & grate trade generally, both dealers and manufacturers and promote the welfare of its members.

We solicit your help in this matter, which is so vital to us, and to this end we hand you herewith a copy of our constitution and by-laws and would urgently request that you join our associa-
148 tion as a non-resident member. If you become a member of our association, as we trust you will, it will be the aim of all our active members to see that your firm is accorded a fair share of the tile business in all the branches as manufactured by you, and to otherwise protect and foster your business in this vicinity. Our interests are mutual and unless the tile manufacturers assist us to break up the unsatsfactory condition of trade in this line, we shall be compelled to give over the trade to the contractors, carpenters and non-dealers and go out of business. These people, though not dealing in tiles, are enabled to take contracts and send to the factories and buy a single order at the same prices which we have to pay and then hire outside labor to place the same; the dealers here carrying stock simply for their accommodation to piece out with. You can readily see that this state of affairs cannot be longer tolerated and we hope you will give this matter your serious consideration and reply favorably to the letter of our secretary of even date.

Yours respectfully,

(Signed) W. W. MONTAGUE & CO., *San Francisco.*
BUSH & MALLETT, *San Francisco.*
MANGRUM & OTTER, *San Francisco.*
BENNETT & SCHUTTE, *San Francisco.*
T. F. RIGNEY, *San Francisco.*
JNO. STOCK SONS, *San Jose.*
HEVENER, MEIR CO., *Sacramento.*
J. F. KELLY, *Oakland.*

149 ARTHUR S. MANGRUM, a witness called, sworn and examined on behalf of defendants, testified as follows:

I am a merchant engaged with Mr. Otter in the tile business in San Francisco, since October, 1895.

I have been engaged since 1887 in that business.

I have been carrying on the business as a dealer—not a manufacturer.

I am a member of the defendant association, and so is my partner.

We became members upon its formation.

The kind of tile that was dealt in in this territory at the time of the formation of this association, as between the dealer and the consumer, was set tile.

Q. Was there any unset tile sold by the dealer in this territory at the time this association was formed?

A. Scarcely nothing.

Q. What percentage would you say of the entire tile trade conducted in this territory by the local dealers was comprised by the unset tile sold by the dealer?

A. I should think one per cent. would be a very conservative estimate.

Q. After the formation of the association, and between the months of August—the latter part of August, or the first part of September, 1898, and the 9th of January, 1899, during that short intervening period of time, what was the percentage of unset tile sold in this territory by the dealers?

A. I don't know that it varied much. It was so insignificant that no account was kept of it.

150 Q. Did the association at any time impose any price upon any dealer, member of the association, with reference to set tile and the trade therein in this territory?

A. No, sir.

Q. Did the association, except with reference to list prices, in connection with this, if I may use your language, "insignificant fraction" of the local trade in unset tile—outside of that, did this association ever fix any price for any member of it, either unset or set tile?

A. No, sir.

Q. Did the association itself at any time ever do any business?

A. No, sir.

Cross-examination:

At your request I have read the latter part of section 7, of the by-laws. The matter of the unset tile that was sold was very insignificant. By unset tile I mean the tile before it is placed on the wall or the floor.

Q. Do you say that persons did not buy that tile and have any tile-setter buy it, and have any one whom they chose set it?

A. I say the percentage was insignificant.

(The witness continuing:) To use your illustration, if a man is

going to build a house, and place therein three bath-rooms, he goes to a dealer, makes his selection, and has the dealer set the tile for him. The dealer sells him the tile set for so much in the wall, and quotes him in no other way. Of course we would sell him the tile if he wanted to buy it, but we prefer to set it ourselves. I don't think Lowry and Daly ever had any dealings with my firm. If they came to our store, they could buy unset tiles for we have it for sale.

151 Q. But after the formation of the association, if they came to you, you could not sell it to them for less than list price?

A. No, sir.

Q. And that list price was the price fixed by the American Tile Company with one exception?

A. Yes, sir.

H. T. BUSH, a witness called, sworn and examined on behalf of defendants, testified as follows:

I am a merchant and engaged as a tile dealer in the course of my business. I have been a tile dealer in San Francisco, sixteen to eighteen years, and am a member of the Bush & Mallett Company. I have been a member of the Tile, Mantel and Grate Association since its formation. At the time of the formation of the association, tile in San Francisco and radiating two hundred miles from San Francisco, was sold to the consumer set in the building.

Q. What percentage, at that time, did the sale of unset tile by the dealer bear to the sale of set tile?

A. Answering for my firm, so small that we took no notice of it.

Q. And what was the percentage, from the time of the formation of the association, down to the 9th day of January, 1899?

A. In my business, no difference at all.

Q. Did the association, except with reference to the list price, for unset tile by the local dealer, referred to in section 7, of the by-laws, ever fix any price; either upon set or unset tile, and either by the manufacturer or the dealer?

152 A. There was no price made for unset tile whatever.

Q. Or upon set tile?

A. Or upon set tile.

Cross examination:

I have known Lowry & Daly for quite a while—Mr. Lowry for a long time—he used to work for me.

So far as the tile, mantel and grate business is concerned, they are in the same character of business as I am.

Q. If they purchased their tile from the eastern men, they purchased it, they would sell it the same as you?

A. Yes, sir. If a dealer or tile-setter came to me, I would sell them tile like anything else that I had in my store for sale, at my price.

Here the testimony was closed.

Thereupon, counsel for defendants requested the court to instruct the jury to render a verdict in favor of the defendants, which re-

quest was refused by the court, to which refusal defendants then and there reserved an exception, and now assign such ruling as error:

Exception No. 1.

Thereupon, the court charged the jury as follows, to wit:

Charge to the Jury.

GENTLEMEN OF THE JURY: This is an action at law brought to recover damages alleged to have been sustained by the plaintiffs by reason of injury to their business as dealers in tiles and fireplace fixtures caused by the forming of an association by the de-
153 fendants as dealers in such articles, and which association the plaintiffs claim is within the prohibitory provisions of the act of Congress of July 2, 1890, commonly known as the "Sherman anti-trust act." That act provides, among other things, as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. * * *

"SECTION 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or foreign nations, shall be deemed guilty of a misdemeanor. * * *

"SECTION 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

You will observe that the things forbidden and declared to be unlawful by the act are, first, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States; and, second, the act of monopolizing, or attempting to monopolize or combining or conspiring to monopolize, any part of the trade or commerce among the several States.

154 The charge against the defendants, under these prohibitions, is the organization of an association called the Tile, Mantel & Grate Association of California under an agreement and combination in restraint of trade and commerce. The printed document introduced in evidence and entitled the constitution and by-laws of the Tile, Mantel & Grate Association of California, shows that this association was organized on July 7, 1898, and that the constitution and by-laws were adopted on July 14, 1898. Under the title of preamble and resolutions the objects of the association

are declared to be "to unite all acceptable dealers in tiles, fireplace fixtures and mantels in San Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members."

Article I of the constitution provides as follows, concerning membership in the association:

"SEC. 1. Any individual, corporation or firm engaged or contemplating engaging in the tile, mantel and grate business in San Francisco, or within a radius of two hundred miles thereof (not manufacturers), having an established business and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, shall, after having signed the constitution and by-laws governing said association, and upon the payment of an entrance fee, as hereinafter provided, shall enjoy all the privileges of membership.

155 "SEC. 2. All associated and individual manufacturers of tiles and fireplace fixtures through the United States may become non-resident members of this association upon the payment of an entrance fee, as hereinafter provided, and after having signed the constitution and by-laws governing said association."

Article II provides as follows, concerning fees and dues:

"SEC. 1. The initiation fee of this association shall be, for active members twenty-five dollars, and for non-resident members ten dollars, which amounts must accompany each application for membership.

"SEC. 2. Each active member of the association shall pay ten dollars per year as dues, payable in advance on the third Monday in August of each year. No dues shall be charged against non-resident members."

Article IV makes provision for amendments to the constitution as follows:

"All proposed alterations or amendments to this constitution shall be submitted in writing at a regular meeting, and no action thereon shall be taken until the next succeeding regular meeting. Due notice of such alterations or amendments shall be mailed to each member at least one week prior to the meeting at which action is to be taken thereon, and such alterations or amendments must receive the approval of two-thirds of the active members of the association."

The documents introduced in evidence as the constitution and by-laws of the association contains the provisions which have been quoted, and there is no evidence in the document itself of

156 any amendment thereof. But there is testimony to the effect that that part of article I of the constitution limiting the qualification of membership to those persons engaged in the tile, mantel, and grate business in San Francisco having an established business and carrying not less than $3,000 worth of stock, has not been enforced as to the requirement that the member shall have a stock of goods of the value of $3,000. There is also testimony to the effect that the provision of article II, relating to the fees and

dues and fixing the initiation fee for active members at $25, has been changed to provide that the initiation fee for such membership shall be $10.

The real purpose and object of the association appears to be declared in sections 7 and 8 of the by-laws.

Section 7 provides that "No dealer and active member of this association shall purchase directly or indirectly any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association."

Section 8 provides as follows: "Manufacturers of tile or fireplace fixtures, or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel & Grate Association of California shall forfeit their membership in the association."

The uncontroverted evidence in this case shows that the
157 active members of the association consist of a number of dealers in tiles, mantels, and grates in San Francisco, and that they are not manufacturers of any of these articles; that the non-resident members of the association consist of a number of manufacturers of tiles and fireplace fixtures situated in different parts of the United States outside of California.

The plaintiffs were not members of the association, and have not been at any time during its existence.

Is it the apparent purpose and the natural and direct consequence of this provision of the constitution and by-laws of the Tile, Mantel & Grate Association, to restrain trade and commerce between the dealers in tiles, mantels, and grates in San Francisco and the manufacturers of such articles in the Eastern States? Or do these provisions operate in such a way that the members of the association have monopolized or have attempted to monopolize any part of the trade or commerce in these commodities between the manufacturers in the East and the dealers in San Francisco?

The purpose of the organization, as declared in the preamble and in section 2 of article 1 of the constitution, was to embrace "all American manufacturers" of tiles and fireplace fixtures as non-resident members, and the "acceptable dealers" in tiles, fireplace fixtures and mantels in San Francisco and vicinity (within a radius of 200 miles) as the active resident members. It does not appear that the declared purpose of the association has actually been accomplished in the completeness of its membership. Not all
158 American manufacturers of tiles and fireplace fixtures have become non-resident members. Whether all "acceptable dealers" in San Francisco have become members is not entirely clear, nor is it certain what constitutes an "acceptable member." But the natural effect and necessary consequence of the agreement and combination, so far as completed and actually enforced, is to limit the San Francisco dealer who is a member of the association in his purchase of tiles and fireplace fixtures to those

manufacturers in the United States who are non-resident members of the association. The San Francisco dealer who has become a member of this association cannot purchase tiles and fireplace fixtures from any outside manufacturer except under penalty of forfeiting his membership in the association, and the manufacturer belonging to the association as a non-resident member cannot sell to any dealer in San Francisco who is not a member of the association, except under the same penalty of forfeiture of membership. If all the manufacturers of tiles and fireplace fixtures in the United States should become members of the association, then no dealer in tiles or fireplace fixtures not a member of the association could carry on his business in San Francisco, because there would be no manufacturer of those articles from whom he could purchase the goods; and as he could not purchase from another dealer in San Francisco who, as a member of the association, is entitled to buy from the eastern manufacturer except at list prices for unset tiles, he could not compete with other dealers, these list prices being so high. He could thus be practically debarred from continuing his business.

159 On the other hand, if all the dealers in San Francisco should prove to be "acceptable members" of the association, and not all the manufacturers of tiles and fireplace fixtures in the United States should become non-resident members, such manufacturers remaining out of the organization would be deprived of all customers in San Francisco, because no dealer in San Francisco could purchase tiles from such a manufacturer except under penalty of forfeiture of his membership in the association.

In other words, the eastern manufacturer who becomes a member of this association is restricted in his selling market to members of the association in San Francisco, and the San Francisco dealer who is a member of the association is restricted in his purchasing market to manufacturers who are members of the association. But this is not all. The eastern manufacturer who is not a member of the association is also restricted in his selling market to the dealers in San Francisco who are not members of the association, and the dealers in San Francisco who are not members of the association are also restricted in their purchasing market to those manufacturers who are not members of the association. It will be said, however, that all manufacturers of tiles and fireplace fixtures in the United States may become members of the association. But upon what terms? The manufacturer must apply for and obtain membership in the association and pay a fee of ten dollars, and in order that the San Francisco dealer may have the privilege of purchasing tiles

160 and fireplace fixtures from the manufacturers who are members of the association, he must first prove himself to be an "acceptible member" to the other members of the association, and if he finds himself to be an "acceptable member," he must pay a fee of ten dollars, and thereafter must continue to pay annual dues in the sum of ten dollars.

It has been held that an ordinance of a municipal corporation requiring persons or firms soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax, is an exercise of the

taxing power; and when enforced against a person or firm soliciting orders for a manufacturer of goods in another State, it imposes a tax upon and is a regulation of interstate commerce, in violation of the provisions of the Constitution of the United States.

In Robbins *vs.* Taxing District, 120 U. S. 489, a statute of Tennessee, declared that all drummers and all persons not having a regularly licensed house of business in the taxing district, offering for sale or selling goods therein by sample, should be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege. Robbins was engaged in soliciting in the city of Memphis, Tennessee, the sale of goods for a Cincinnati firm; exhibiting samples for the purpose of securing orders for the goods. He had no license, and was prosecuted and convicted for a violation of the statute. The statute made no discrimination between those who represented business houses out of the State and those who represented like houses within the State.

There was, therefore, no element of discrimination in the
161 case. But, notwithstanding this equality of the tax upon all dealers, the conviction was set aside by the Supreme Court of the United States on the ground that, whatever the State might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the State, it could not impose upon those who acted as drummers for houses outside of the State any burden by way of a license tax, for the reason that such persons were engaged in interstate commerce, which must be left free from any restrictions or impositions whatever. Negotiations in the conduct of interstate commerce could not be taxed by the State, or by a municipal corporation under its authority.

In Corson *vs.* Maryland, 120 U. S. 503, the same question arose with respect to a provision of the Code of Maryland, and the same doctrine declared as in the preceding case.

In Asher *vs.* Texas, 128 U. S. 129, a statute of the State of Texas required any commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, to pay an annual occupation tax of $35. This statute was declared to be unconstitutional, and the case of Robbins *vs.* Taxing District was expressly affirmed, to meet the vigorous assault made by the court of appeals of Texas upon the doctrine of that case.

In Stoutenborough *vs.* Hennick, 129 U. S. 141, an agent of a firm doing business in the city of Baltimore solicited orders in the District of Columbia, without having taken out a license there as required by an act of the Legislative Assembly of that District.
162 The Supreme Court held that this law was invalid, and construed to include the business of an agent soliciting orders for a business house located outside the District.

In Brennan *vs.* City of Titusville, 153 U. S. 289, an order of the city of Titusville provided: "That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said

treasurer therefor the following sums, according to the time for which said license shall be granted," etc. The facts of the case were these: One Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, in the State of Illinois, in which city he had his manufactory and place of business. The defendant Brennan was an agent of Shepard, employed by him to travell and solicit orders for said pictures and frames. Upon receiving orders for such goods, Brennan forwarded the same to Shephard, at Chicago, where the goods were made, and from there shipped to the purchasers, in Titusville, in the State of Pennsylvania, by railroad, freight and express; and the price of the goods was collected and forwarded to Shephard, sometimes by the express company, and at other times by the agent of Shephard. Brennan was engaged in conducting the business in the manner stated at the time of his arrest, without having obtained a license as required by the municipal ordinance. He was convicted, and sentenced to pay a fine of $25 and costs. From that judgment he
163 appealed to the supreme court of the State, where the judgment was affirmed, the court holding that the ordinance was enacted in the exercise of the police power of the State. (City of Titusville *vs.* Brennan, 143 Pa. St. 642, 22 Atl. 893.) Brennan thereupon ssued out a writ of error to the Supreme Court of the United States. The whole question was again reviewed by that court and all the previous cases in that court relating to the subject carefully considered. The court declared that commerce between the citizens of the several States must be absolutely free from restraint. The court said: "It must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstatte commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In Leisy *vs.* Hardin, 135 U. S. 100. the Supreme Court held that a State statute, prohibiting the sale of intoxicating liquors, except for certain purposes and under license from a county court, was unconstituttional and void when applied to a sale by an importer of liquors brought from another State in the original packages, because the operation of the law was repugnant to the power of Congress to regulate commerce among the several States. The court, in passing upon the question said: "The power vested in Congress 'to regulate commerce with foreign nations and among the several
164 States and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior, and must be capable of authorrizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

And further, to make this limitation on State authority over

interstate commerce more clear, the court said: "It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

In the case of United States *vs.* Coal Dealers' Association of California, 85 Fed. 252, this court, referring to the case just quoted from, said: "If a law of a State, regulating the sale of intoxicating liquors, so as to prohibit their sale except for certain purposes and under license from a county court, is unconstitutional and void when applied to a sale by an importer of liquors brought from another State in the original packages, because the law in that relation is in restraint of trade and commerce 'among the several States,' what shall be said of the constitution and by-laws of the Coal Dealers' Association, and the agreement of that associa-
165 tion with the wholesale dealers respecting the sale of imported coal in San Francisco under the anti-trust act? If one is in restraint of commerce, is not the other?"

In United States *vs.* Addyston Pipe & Steel Co., 85 Fed. 271, 54 U. S. App. 723, 767, Judge Taft considered the effect of such State statutes in the same relation, and said: "If, then, the soliciting of orders for, and the sale of, goods in one State, to be delivered from another State, is interstate commerce in its strictest and highest sense—such that the States are excluded by the Federal Constitution from a right to regulate or tax the same—it seems clear that contracts in restraint of such solicitations, negotiations, and sales, are contracts in restraint of interstate commerce."

These observations appear to the court to be applicable to the effect of the constitution and by-laws of the Tile, Mantel & Grate Association of California involved in this case. If an ordinance of San Francisco imposing a tax of ten dollars upon a solicitor who should seek orders for tiles and fireplace fixtures for an eastern manufacturer would be contrary to law, because a restriction upon interstate commerce, then a like fee and the conditions of membership imposed by this organization upon eastern manufacturers for the privilege of selling to San Francisco dealers who are members of the association, is also a restriction upon interstate commerce, and would for the same reason be contrary to law.

This brings us to the question as to the effect this organi-
166 zation had upon the price of tiles in this market. Mr. W. B. Webster, the secretary and treasurer of the Tile, Mantel & Grate Association of California, testified as follows, on cross-examination:

"Q. After the formation of the corporation, and the adoption of the list price of the American Tile Company by your association, that did raise the price of tile in this market, did it not? You can answer that easy?

"A. Yes, sir; it raised the price. The eastern factories raised the price also on us.

"Q. The eastern factories raised the price on you?

"A. Yes, sir; the price was raised twice since that time on us;

that is, not the list, but the discount for orders. They are less today than they were at that time.

"Q. That is, the factories from whom you buy?

"A. Yes, sir, and other factories that notified us of the raise.

"Q. Did you not state to your counsel that the price had been practically the same for the same character of goods by all the factories?

"A. From the time of the society up to the present time.

"Q. Before the formation of the society up to the present time?

"A. No, sir.

"Q. You did not so state?

"A. I did not understand the question, if I did, because it is a known fact that the prices have been raised three or four times.

"Q. The prices, then, since this formation, have been raised?

"A. Yes, sir."

167 As was said by the Supreme Court of the United States in Addyston Pipe & Steel Co. *vs.* United States, 175 U. S. 246: "Any combination among dealers in that kind of commodities, which in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would be one in restraint of trade or commerce among the States."

Under these conditions, the dealing in tiles and fireplace fixtures between the manufacturing members of the association in the east and the dealers in San Francisco, also members of the association, is in effect a monopoly of at least a part of the trade and commerce between California and Eastern States in those articles; and this monopoly, excluding as it does the outside manufacturer and the outside dealer, except upon conditions, is also in restraint of trade and commerce between the several States.

The uncontroverted testimony fully supports this practical operation of the agreement and combination, as disclosed by the constitution and by-laws of the association, in whatever light it may be considered. It follows, therefore, that the court is called upon to instruct you that, under the law, the members of this organization have in violation of law, entered into a contract and combination in restraint of trade and commerce, and that they have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers in the east and the dealers in San Francisco, in the articles of tiles.

168 Under these instructions, there is left for your consideration the single question of damages.

To the giving of the foregoing instructions and in particular the following part of said instructions, viz:

"The court is called upon to instruct you, that under the law, the members of this organization have in violation of law, entered into a contract and combination in restraint of trade and commerce, and that they have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers in the East and the dealers in San Francisco, in the article of tiles."

"Under these instructions, there is left for your consideration the

single question of damages," said defendants then and there reserved an exception, and now assign said instruction and charge as error.

Exception No. II.

The jury thereupon retired to deliberate upon the verdict, and subsequently returned into court and rendered their verdict, which was and is in the words and figures following, to wit:

(Title of Court and Cause.)

We, the jury, find in favor of the plaintiffs, and assess the damages at the sum of five hundred ($500.00) dollars.

J. J. WHITE, *Foreman.*

169 Thereupon, upon the said verdict, counsel for plaintiffs moved the court to enter judgment for three times the amount of such verdict, and also for a reasonable counsel fee for bringing and prosecuting the said action. The further hearing of this motion was continued by the court until the 2d day of January, 1901, at eleven o'clock a. m., at which time the following proceedings were had and taken.

Evidence was introduced by plaintiffs tending to prove that the said action occupied five days in the trial thereof, including the argument of the same to the jury. Two witnesses were thereupon called for the plaintiffs, who testified that they were practicing attorneys-at-law and that a reasonable attorney's fee for the bringing and prosecuting of said action and the five days' trial would be from seven hundred and fifty dollars ($750.00) to one thousand dollars ($1,000.00), and that in arriving at such conclusion the amount of the verdict did not enter as an element or factor into their consideration.

The defendants introduced no evidence on said motion, and the matter was thereupon submitted to the court, and the said court then and there gave and entered its order granting the said motion for the entry of judgment for three times the amount of the verdict, and for a counsel fee, and assessed such counsel fee at the sum of seven hundred and fifty dollars ($750.00).

To the order given and entered by the court granting the said motion for the entry of said judgment in three times the amount of the verdict, the defendants then and there reserved an exception, and now assigns the same as error.

170 Exception No. III.

To the giving and entry of said order allowing said counsel fee in the sum of seven hundred and fifty dollars ($750.00), said defendants likewise then and there excepted as being unreasonable and excessive and now assigns the same as error.

Exception No. IV.

Thereupon judgment was entered accordingly, said judgment being in the words and figures following, to wit:

(Title of Court and Cause.)

This cause having come on regularly for trial upon the 13th day of December, 1900, being a day in the November, 1900, term of said court, before a court and a jury of twelve men, duly impaneled and sworn to well and truly try the issues joined herein; Joseph C. Campbell and Robert W. Campbell, Esqs., appearing upon behalf of plaintiffs, and Walter H. Linforth and P. F. Dunne, Esqs., appearing upon behalf of the defendants, W. W. Montague and Company, *et al.*, who have appeared and answered herein; and the trial having been proceeded with, and the evidence, oral and documentary, on behalf of the respective parties having been introduced and closed; and the cause, after arguments of the attorneys for the respective parties, and the instructions of the court having been submitted to the jury; and the jury having subsequently returned the following verdict: "We, the jury, find in favor of the plaintiffs, and assess the damages at the sum of five hundred ($500.00) dol-
171 lars," and the court, after hearing and consideration of a motion in that behalf, ordered that judgment be entered herein in favor of plaintiffs, and against the defendants who have appeared and answered herein, for treble the amount awarded by the verdict of the jury, together with an attorney's fee in the sum of seven hundred and fifty dollars and for costs.

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court that Edward S. Lowry and James J. Daly, copartners, doing business under the firm name and style of Lowry and Daly, plaintiffs herein, do have and recover of and from W. W. Montague and Company (a corporation), Bush & Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte, partners, trading as Bennett and Schutte, John Stock Sons (a corporation), Hevener, Meir and Company (a copartnership consisting of William C. Hevener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, defendants herein, the sum of fifteen hundred dollars ($1,500.00), together with an attorney's fee in the sum of seven hundred and fifty dollars ($750.00), and their costs in this behalf expended taxed at $113.95.

Specifications of Insufficiency of Evidence.

I.

The evidence failed to show the making by the defendants,
172 or any or either of them, of any contract in restraint of trade or commerce among the several States or with foreign nations

II.

The evidence failed to show that the defendants, or any or either of them, engaged in any combination in the form of trust or otherwise, in restraint of trade or commerce among the several States or with foreign nations.

III.

The evidence failed to show that the defendants, or any or either of them, engaged in any conspiracy in restraint of trade or commerce among the several States or with foreign nations.

IV.

The evidence failed to show that the defendants, or any or either of them, monopolized any part of the trade or commerce among the several States or with foreign nations.

V.

The evidence failed to show that the defendants, or any or either of them, attempted to monopolize any part of the trade or commerce among the several States or with foreign nations.

VI.

The evidence failed to show that the defendants, or any or either of them, combined with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

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VII.

The evidence failed to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VIII.

The evidence failed to show that the defendants, or any or either of them, attempted to combine with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

IX.

The evidence failed to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

X.

The evidence failed to show the existence of any contract, combination, or association whatever to which the defendants, or any or either of them, were related, other than a voluntary association by defendants for the purpose of improving the conditions of the trade, in which said defendants were engaged, without in any respect affecting such trade in so far as the same existed between any States of this country or with any foreign nation, or in any respect or to any extent, or at all, restraining such trade in the directions last mentioned.

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XI.

The evidence failed to show the existence of any monopoly or attempt at monopoly, or combination or conspiracy to monopolize, or any attempt at such combination or conspiracy, to which the defendants, or any or either of them, were related, with respect to any part of the trade or commerce among the several States of this country or with any foreign nation.

Specifications Wherein the Verdict is Against Law.

I.

The verdict is against law in this, that there was no evidence tending to show the making by the defendants, or any or either of them, of any contract in restraint of trade or commerce among the several States or with foreign nations.

II.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, engaged in any combination in the form of trust or otherwise in restraint of trade or commerce among the several States or with foreign nations.

III.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, engaged in any conspiracy in restraint of trade or commerce among the several States or with foreign nations.

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IV.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, monopolized any part of the trade or commerce among the several States or with foreign nations.

V.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, attempted to monopolize any part of the trade or commerce among the several States or with foreign nations.

VI.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, combined with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VII.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VIII.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, attempted to combine with any other person or persons to
176 monopolize any part of the trade or commerce among the several States or with foreign nations.

IX.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

X.

The verdict is against law in this, that there was no evidence tending to show the existence of any contract, combination or association whatever to which the defendants, or any or either of them, were related, other than a voluntary association by defendants for the purpose of improving the conditions of the trade, in which said defendants were engaged, without in any respect affecting such trade in so far as the same existed between any States of this country, or with any foreign nation, or in any respect or to any extent, or at all, restraining such trade in the directions last mentioned.

XI.

The verdict is against law in this, that there was no evidence tending to show the existence of any monopoly, or attempt at monopoly, or combination or conspiracy to monopolize, or at any attempt at such combination or conspiracy to which the defendants, or any or either of them, were related, with respect to any part of the trade or commerce among the several States of this country or with any foreign nation.

177 *Assignments of Errors in Law Occurring at the Trial.*

I.

The court erred in refusing to instruct the jury, as requested by the defendants, to render a verdict for the defendants, being exception heretofore numbered I.

II.

The court erred in giving the jury *to* the charge, hereinbefore set out, that under the law the members of the association, defendants had in violation of law entered into a contract and combination in restraint of trade and commerce, and have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers in the East and the dealers in San Francisco, in the article of tiles; being exception heretofore numbered II.

III.

The court erred in granting the motion of plaintiffs for entry of judgment on the verdict for three times the amount thereof; being exception heretofore designated as exception numbered III.

IV.

178 The court erred in granting the motion of plaintiffs in respect to counsel fee, that is to say, in granting such motion by the assessment of such counsel fee at the sum of seven hundred and fifty dollars ($750.00); being the exception heretofore designated as exception number IV.

V.

The court erred in entering judgment on the verdict for three times the amount thereof, or in any amount whatever.

VI.

The court erred in granting the motion for entry of judgment for counsel fees in the sum of seven hundred and fifty dollars ($750.00), or in any amount whatever.

P. F. DUNNE,
LINFORTH & WHITAKER,
WALTER H. LINFORTH,
Attorneys for Certain Defendants.

The foregoing bill of exceptions is correct in all respects, and is hereby approved, allowed, settled, and made a part of the record herein.

Dated this 3d day of April, 1901.

WM. W. MORROW,
Judge Circuit Court.

It is hereby stipulated, understood, and agreed by and between the respective parties hereto that the foregoing bill of exceptions is true in all respects, and the same may be certified, 179 settled, allowed, and approved, and made a part of the record herein; and further, that this bill may be approved, allowed and

settled by the Hon. W. W. Morrow, circuit judge of the ninth judicial circuit, northern district of California.

Dated April 3d, 1901.

REDDY, CAMPBELL & METSON,
Attorneys for Plaintiffs.

P. F. DUNNE,
LINFORTH & WHITAKER, AND
WALTER H. LINFORTH,
Attorneys for Certain Defendants.

(Endorsed:) Filed April 3, 1901. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

180 In the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Company (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Company (a Corporation), The Pittsburg Tile Company (a Corporation), The Trent Tile Company (a Corporation), W. W. Montague and Company (a Corporation), Bush and Mallett Company (a Corporation), The Star Encaustic Tile Company, Limited (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavener Meir, and John Doe Stock and Richard Roe Stock, Partners Trading as John Stock Sons, Defendants.

Petition for Allowance of Writ of Error.

To the honorable the judges of the said United States circuit court in and for the ninth judicial circuit and northern district of California, Honorable W. W. Morrow, judge presiding:

The defendants W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte,
181 John Stock Sons (a corporation), Hevener, Meir and Company, (a copartnership consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, the plaintiffs in error herein, respectfully represent that they are defendants and plaintiffs in error in the proceedings and action hereinafter mentioned, and that Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, are the plaintiffs and defendants in error in said action and proceeding.

And the said defendants above named feeling aggrieved by the verdict of the jury, and the judgment entered on the second day of

January, 1901, come now by P. F. Dunne, Esq., and Messrs. Linforth and Whitaker, their attorneys, and petition said court for an order allowing said defendants, last above named, to prosecute a writ of error to the honorable the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the ninth circuit.

And your petitioner will ever pray.

P. F. DUNNE,
LINFORTH & WHITAKER,
Attorneys for said Defendants.

(Endorsed:) Filed March 12th, 1901. Southard Hoffman, clerk.

182 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Plaintiffs,

vs.

THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Company (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Company (a Corporation), The Pittsburg Tile Company (a Corporation), W. W. Montague and Company (a Corporation), Bush and Mallett Company (a Corporation), The Star Encaustic Tile Company, Limited (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavener Meir, and John Doe Stock and Richard Roe Stock, Partners Trading as John Stock Sons, Defendants.

Assignment of Errors.

The defendants, W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Ben-
183 nett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons (a corporation), Heavener, Meir and Company (a copartnership, consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, having petitioned said court for an order permitting them to prosecute a writ of error to the honorable the United States circuit court of appeals for the ninth circuit, from the judgment made and entered in said cause, now make and file with their said petition the following, and specify the same as their assignment of errors herein, and upon which they will rely for reversal of said judgment upon said writ.

I.

Specifications of Insufficiency of Evidence.

I.

The evidence fails to show the making by the defendants, or any or either of them, of any contract in restraint of trade or commerce among the several States, or with foreign nations.

II.

The evidence failed to show that the defendants, or any or either of them, engaged in any combination in the form of trust or otherwise, in restraint of trade or commerce among the several States or with foreign nations.

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III.

The evidence failed to show that the defendants, or any or either of them, engaged in any conspiracy in restraint of trade or commerce among the several States or with foreign nations.

IV.

The evidence failed to show that the defendants, or any or either of them, monopolized any part of the trade or commerce among the several States or with foreign nations.

V.

The evidence failed to show that the defendants, or any or either of them, attempted to monopolize any part of the trade or commerce among the several States or with foreign nations.

VI.

The evidence failed to show that the defendants, or any or either of them, combined with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VII.

The evidence failed to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VIII.

185 The evidence failed to show that the defendants, or any or either of them, attempted to combine with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

IX.

The evidence failed to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize

any part of the trade or commerce among the several States or with foreign nations.

X.

The evidence failed to show the existence of any contract, combination, or association whatever to which defendants, or any or either of them, were related other than a voluntary association by defendants for the purpose of improving the conditions of the trade, in which said defendants were engaged, without in any respect affecting such trade in so far as the same existed between any States of this country or with any foreign nation, or in respect or to any extent, or at all, restraining such trade in the directions last mentioned.

XI.

The evidence failed to show the existence of any monopoly or attempt at monopoly, or combination or conspiracy to monopolize or any attempt at such combination or conspiracy to which the defendants, or any or either of them, were related, with respect to any part of the trade or commerce among the several States of this country with any foreign nation.

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II.

Specifications Wherein the Verdict is Against Law.

I.

The verdict is against law in this, that there was no evidence tending to show the making by the defendants, or any or either of them, of any contract in restraint of trade or commerce among the several States or with foreign nations.

II.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, engaged in any combination in the form of trust or otherwise, in restraint of trade or commerce among the several States or with foreign nations.

III.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, engaged in any conspiracy in restraint of trade or commerce among the several States or with foreign nations.

IV.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, monopolized any part of the trade or commerce among the several States or with foreign nations.

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V.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, attempted to monopolize any part of the trade or commerce among the several States or with foreign nations.

VI.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, combined with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VII.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VIII.

The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, attempted to combine with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

IX.

188 The verdict is against law in this, that there was no evidence tending to show that the defendants, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

X.

The verdict is against law in this, there was no evidence tending to show the existence of any contract, combination, or association whatever to which the defendants, or any or either of them, were related, other than a voluntary association by defendants for the purpose of improving the conditions of the trade, in which said defendants were engaged, without in any respect affecting such trade in so far as the same existed between any States of this country, or with any foreign nation, or in any respect or to any extent, or at all, restraining such trade in the directions last mentioned.

XI.

The verdict is against law in this, there was no evidence tending to show the existence of any monopoly, or attempt at monopoly, or combination or conspiracy to monopolize, or at any attempt at such combination or conspiracy to which the defendants, or any or either

of them were related, with respect to any part of the trade or commerce among the several States of this country or with any foreign nations.

III.

Errors in Law Occurring at the Trial.

I.

The court erred in refusing to instruct the jury, as requested
189 by defendants, to render a verdict for defendants, as will more particularly appear by the exception set forth in the bill of exceptions.

II.

The court erred in giving to the jury the following instructions: "The court is called upon to instruct you, that under the law, the members of this organization have in violation of law, entered into a contract and combination in restraint of trade and commerce, and that they have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers in the East and the dealers in San Francisco in this article of tiles. Under these instructions, there is left for your consideration the single question of damages."

As will more particularly appear by the exception set forth in the bill of exceptions.

III.

The court erred in granting the motion of plaintiffs for entry of judgment on the verdict of three times the amount thereof, as will more particularly appear by the exception set forth in the bill of exceptions.

IV.

The court erred in granting the motion of plaintiffs in respect to counsel fee, that is to say, in granting such motion by the assessment of such counsel fee at the sum of seven hundred and fifty dollars ($750.00), as will more particularly appear by the exception set forth in the bill of exceptions.

190 V.

The court erred in entering judgment on the verdict for three times the amount thereof, or in any amount whatever, as will more particularly appear by the exception set forth in the bill of exceptions.

VI.

The court erred in granting the motion for entry of judgment for counsel fees in the sum of seven hundred and fifty dollars ($750.00), or in any amount whatever, as will more particularly appear by the exception set forth in the bill of exceptions.

Wherefore, by reason of the foregoing assignment of errors, and

the petition of the said defendants, plaintiffs in error herein, for leave to prosecute a writ of error herein to the United States circuit court of appeals, ninth circuit, the plaintiffs in error submit their said petition and these assignments of error, and pray for an order of this honorable court allowing them to prosecute said writ to said United States circuit court of appeals.

P. F. DUNNE,
LINFORTH & WHITAKER,
Attorneys for said Defendants and Plaintiffs in Error.

(Endorsed:) Filed March 12th, 1901. Southard Hoffman, clerk.

191 In the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA and all Members of said Association, and also against Columbia Encaustic Tile Company (a Corporation), The United States Encaustic Tile Works (a Corporation), The Cambridge Tile Manufacturing Company (a Corporation), The Pittsburg Tile Company (a Corporation), The Trent Tile Company (a Corporation), W. W. Montague and Company (a Corporation), Bush and Mallett Company (a Corporation), The Star Encaustic Tile Company, Limited (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; Heavener and Meir, and John Doe Stock and Richard Roe Stock, Partners Trading as John Stock Sons, Defendants.

Order Allowing Writ of Error.

And now on this 12th day of March, A. D. 1901, on motion of P. F. Dunne, Esq., and Messrs. Linforth and Whitaker, of counsel for
192 W. W. Montague and Company (a corporation), Bush and Mallet Company (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons (a corporation), Heavener, Meir and Company (a copartnership consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile Mantel and Grate Association of California, defendants in the above-entitled action, it is ordered that a writ of error herein be and is hereby allowed and in order to stay execution upon the writ of error, said defendants last above named shall file a supersedeas bond in the sum of $2,500.

WM. W. MORROW,
Judge of the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

(Endorsed:) Filed March 12, 1901. Southard Hoffman, clerk.

193 In the Circuit Court of the United States in and for the Ninth Judicial Circuit and Northern District of California.

W. W. MONTAGUE AND COMPANY (a Corporation), BUSH AND Mallett Company (a Corporation), Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett & Schutte; John Stock Sons (a Corporation), Heavener, Meir and Company (a Copartnership Consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a Corporation), and The Tile, Mantel and Grate Association of California, Plaintiffs in Error,

vs.

EDWARD S. LOWRY and JAMES J. DALY, Trading as Lowry and Daly, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents, that we, W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons (a corporation), Heavener,
Meir and Company (a copart-ership consisting of William C.
194 Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, as principals, and H. T. Bush, A. S. Mangrum and Daniel Wilson as sureties, are held and firmly bound unto Edward S. Lowry and James J. Daly, partners, trading as Lowry and Daly, in the full and just sum of twenty-five hundred dollars ($2500) for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally; firmly by these presents.

Sealed with our seals and dated this 13th day of March, 1901.

Whereas, at a term of said circuit court of the United States for the ninth circuit, northern district of California, held in the city and county of San Francisco, in said State, in a suit pending in said court between Edward S. Lowry and James J. Daly, partners, trading as Lowry and Daly, as plaintiffs, defendants in error above named and W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte (partners trading as Bennett and Schutte), John Stock Sons (a corporation), Heavener, Meir and Company (a copartnership consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, defendants, plaintiffs in error above named, a judgment was rendered against said above-named principals, in favor of said Edward S. Lowry and James J. Daly, partners, trading as Lowry and Daly, for the sum of twenty-two hundred and fifty dollars ($2250), and $113.95 costs; and

195 Whereas, upon the 12th day of March, A. D. 1901, the said plaintiffs in error filed in said court their petition for an order allowing them to prosecute a writ of error to the United States circuit court of appeals for the ninth circuit, for an order of said court

fixing the amount of security which they shall be required to give to the defendants in error in said action pending the prosecuting of said writ of error, to operate as a supersedeas and stay of execution until said writ of error shall have been heard and determined in said United States court of appeals; and

Whereas, upon the said 12th day of March, 1901, the said circuit court, upon said petition duly made and had, entered of record in said court an order allowing a writ of error in said action in favor of W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte (partners, trading as Bennett and Schutte), John Stock Sons (a corporation), Heavener, Meir and Company (a copartnership consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, plaintiffs in error, from said judgment to the United States circuit court of appeals for the ninth circuit, and in said order also fixed the amount of security which the said above-bounden principals should be required to give, pending the determination of said cause in said United States circuit court of appeals, and to stay execution herein, at the sum of twenty-five hundred dollars ($2500):

196 Now, the condition of this obligation is such, that if the said W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte, (partners trading as Bennett and Schutte), John Stock Sons (a corporation), Heavener, Meir and Company (a copartnership consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, shall prosecute said writ of error to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation be void; otherwise it shall be and remain in full force and virtue.

W. W. MONTAGUE AND COMPANY,
By W. W. MONTAGUE, *President.*
BUSH AND MALLETT COMPANY,
By H. T. BUSH, *President.*
BENNETT & SCHUTTE,
By JOHN H. SCHUTTE.
JOHN STOCK SONS,
By W. B. WEBSTER.
HEVENER, MIER & CO.,
By W. B. WEBSTER.
MANGRUM AND OTTER,
By A. S. MANGRUM, *President.*

197 THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA,
By W. B. WEBSTER, *Secretary.*
H. T. BUSH,
A. S. MANGRUM,
DANIEL WILSON, *Sureties.*

UNITED STATES OF AMERICA,
Northern District of California, } ss:

H. T. Bush, A. S. Mangrum, and Daniel Wilson, being duly sworn, each for himself deposes and says that he is freeholder in said district, and is worth the sum of twenty-five hundred dollars ($2500), exclusive of property exempt from execution, over and above all debts and liabilities.

H. T. BUSH.
A. S. MANGRUM.
DANIEL WILSON.

Subscribed and sworn to before me this 13th day of March, A. D. 1901.

[SEAL.]

W. T. HESS,
Notary Public in and for the City and County of San Francisco, State of California.

Being satisfied with the foregoing sureties and bond, we hereby consent that said bond be approved.
March 13, 1901.

REDDY, CAMPBELL & METSON,
Attorneys for Defendants in Error.

198 The above bond upon writ of error is hereby approved and execution stayed pending the determination of said writ.
March 13, 1901.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Filed March 13, 1901. Southard Hoffman, clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry & Daly, Plaintiffs,
vs.
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA, etc., *et al.*, Defendants.

Certificate to Transcript on Writ of Error.

I, Southard Hoffman, clerk of the circuit court of the United States, ninth judicial circuit, northern district of California, do hereby certify the foregoing one hundred and seventy-eight (178) written pages, numbered from 1 to 178, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the
199 above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of

error is $112.35, and that said amount was paid by the defendants and plaintiffs in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 25th day of April, A. D. 1901.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California,
By W. B. BEAIZLEY, *Deputy Clerk.*

(Ten-cent U. S. int. rev. stamp. Canceled.)

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the ninth circuit, northern district of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some of you, between W. W. Montague and Company, (a corporation), Bush & Mallett (a corporation), Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons (a corporation), Hevener Meir and Company, (a copartnership consisting of William C. Hevener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, plaintiffs in error, and Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, defendants in error, a manifest errror hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears.

200

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 10th day of April next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of March, in the year of our Lord one thousand nine hundred and one.

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[SEAL.] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

Allowed by Wm. W. Morrow, judge, in an order signed and filed in said circuit court, March 12, 1901.

SOUTHARD HOFFMAN, *Clerk.*

Service of within writ and receipt of a copy thereof is hereby admitted this 12th day of March, 1901.

REDDY, CAMPBELL & METSON,
Attorney- for Defendants in Error.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals, for the ninth circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

202 (Endorsed :) No. 12,698. Circuit court of the United States, ninth circuit, northern district of California. W. W. Montague and Company *et al.*, plaintiffs in error, *vs.* Edward S. Lowry *et al.*, defendants in error. Writ of error. Filed March 12, 1901. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

Citation.

UNITED STATES OF AMERICA, *ss :*

The President of the United States to Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, Greeting :

You are hereby cited and admonished to be and appear at the United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 10th day of April next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, northern district of California, in a certain action numbered 12,678, wherein W. W. Montague and Company (a corporation), Bush and Mallett Company (a corporation), Mrs. Mary Bennett and John H. Schutte (partners trading as Bennett and Schutte), John Stock Sons (a corporation), Heavener, Meir and Company (a corporation consisting of William C. Heavener and Charles W. Meir), Mangrum and Otter (a corporation), and The Tile, Mantel and Grate Association of California, are plaintiffs in error, and you are defend-

203 ants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, judge of the United States circuit court, ninth circuit, northern district of California, this 14th day of March, A. D. 1901.

W. W. MORROW, *Judge.*

Due service of the within and foregoing citation in the above-entitled action, on behalf of Edward S. Lowry and James J. Daly (partners trading as Lowry and Daly), defendants in error, is hereby admitted this 14th day of March, 1901.

REDDY, CAMPBELL & METSON,
Attorneys for Edward S. Lowry and James J. Daly (Partners Trading as Lowry and Daly), Defendants in Error.

(Endorsed:) No. 12,698. In the circuit court of the United States, ninth circuit, northern district of California. W. W. Montague and Company (a corporation) *et al.*, plaintiffs in error *vs.* Edward S. Lowry and James J. Daly, partners, etc., defendants in error. Citation. Filed March 15th, 1901. Southard Hoffman, clerk. T. F. Dunne, Walter H. Linforth, attorney- and counselor- at law, Claus Spreckels building, San Francisco, proctors for plaintiffs in error.

204 (Endorsed:) No. 697. In the United States circuit court of appeals for the ninth circuit. W. W. Montague and Company, a corporation, Bush & Mallett, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of California, plaintiffs in error, *vs.* Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, defendants in error. Transcript of record. In error to the circuit court of the United States, of the ninth judicial circuit, in and for the northern district of California. Filed April 25, 1901. F. D. Monckton, clerk.

205 United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation, ET AL., Plaintiffs in Error.
v.
EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error. } No. 697.

Upon writ of error to the circuit court of the United States for the northern district of California.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

The writ of error in this case is brought to review the judgment of the circuit court rendered in an action which the defendants

in error brought against the plaintiffs in error under the act of Congress of July 2, 1890, 26 Stats., 209, commonly known as the Sherman anti-trust act. The complaint alleged that the plaintiffs therein had been injured in their business by reason of the illegal combination between the defendants therein made under the name of The Tile, Mantel and Grate Association of California. The substantial facts alleged in the complaint and proved on the trial were that for a number of years prior to the year 1898 the defendants in error had been engaged in the business of buying and selling and setting tiles, mantels and grates in the
206 city of San Francisco and that the tile which they used in their business was purchased from some of the various tile manufacturers in the States of Ohio, Indiana, Kentucky, New Jersey and Pennsylvania, who subsequently entered into the association, there being no manufacturers of tiles in the State of California; that by industry and attention thereto the defendants in error had established a profitable business; that in the year 1898 the plaintiffs in error formed the association, the object of which as declared in its articles was "to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of two hundred miles) and all American manufacturers of tiles, and by frequent interchange of ideas advance and promote the mutual welfare of its members." As to membership it provided that any individual, corporation or firm engaged in the tile, mantel and grate business in San Francisco or within a radius of two hundred miles therefrom having an established business and carrying not less than $3,000 worth of stock and having been proposed by a member in good standing and elected and having signed the constitution and by-laws and paid an entrance fee of $10 might become a member. It was also provided that all manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members upon the payment of an entrance fee and signing the constitution and by-laws. Section 7 of the by-laws forbade members of the association to purchase goods from any manufacturer unless the latter were a member of the association, and forbade them to "sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association under penalty of expulsion from the association." It provided further that any manufacturer selling goods to others than members of the association should forfeit membership. It was shown that the list price referred to in section 7 was a nominal catalogue price of goods
207 fixed by the manufacturers for convenience, but that in selling to members of the association, and prior to forming the association, in selling to the trade generally, the manufacturers had allowed large discounts from the list prices, amounting to something more than 50% thereof. The defendants in error alleged in their complaint that it required the unanimous consent of the association to become a member thereof, and that by reason of certain business difficulties there were members of the association who were antagonistic to them, and who would not have permitted them to join if they had applied, and that they were not eligible to join the associ-

ation for the further reason that they did not carry at all times stock of the value of $3,000. They also alleged that the association constituted a trust and conspiracy in restraint of interstate trade and commerce and a monopoly of the grate, tile and mantel trade between the parties engaged therein. The jury found damages for the defendants in error in the sum of $500 and for that amount judgment was rendered in their favor and for the further sum of $750 for an attorney's fee which was allowed by the court.

GILBERT, circuit judge, after stating the case as above delivered the opinion of the court.

Two questions are presented upon the writ of error, first, did the association constitute a combination which was within the prohibition of the act of July 2, 1890, and second, was the amount of the attorney's fee allowed by the court excessive? In answering the first question we must first take into the account the declared purpose of the association. It was formed to unite all acceptable dealers engaged in the tile, grate and mantel business in San Francisco and within a radius of two hundred miles therefrom and all American manufacturers of tiles. In its scope it included upon the one hand every manufacturer of tiles wherever situate in the United States and upon the other the six firms of
208 local dealers who joined the association at its formation together with those who might be permitted thereafter to become members. The defendants in error were not invited to enter into the combination. The rules prescribed that others in the same line of business who had an established business and carried stock of the value of $3,000 and who were "acceptable" might upon the proposition of one who was already a member and upon the vote of the association be permitted to join the combination. The evidence shows that the defendants in error after the formation of the association made efforts to purchase tile from manufacturers in Indiana with whom they had before been doing business and that their orders were declined and they were notified that they could not purchase goods from the manufacturers unless they became members of the association. They could not obtain tile from the local dealers in San Francisco unless they paid the "list" price which was more than double the price which members of the association were required to pay.

We think that in the light of these facts the association clearly comes within the prohibition of the act of Congress. It has a direct tendency to restrain trade between the different States and to create a monopoly. In principle it would be the same if it were an association between all the manufacturers of the United States in that line of goods and a single dealer in California whereby all other resident dealers were shut out and all competition between local dealers extinguished. Section 1 of the act of July 2, 1890, provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal," and it proceeds

to denounce a penalty against any one who shall make any such contract or engage in any such combination or conspiracy. Interstate commerce "includes the purchase, sale and exchange of
209 commodities." Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 203, and every agreement which has the tendency to restrain the purchase, sale and exchange of commodities is brought within the prohibition of the statute. Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 238. The combination in the case before the court evidently tended to restrain trade. The defendants in error who had been regular purchasers of goods from the manufacturers were shut out from dealing with them from the time when the association was formed. Their orders to the manufacturers for goods were rejected for the express reason and for no other reason than that they were not members of the association.

The tendency of the combination was also to create a monopoly in the hands of the local members thereof. Section 2 of the act includes within its prohibition "every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of trade or commerce among the several States or with foreign nations." The combination in the case before the court was not one such as might lawfully have been made between the residents of a single State for the purpose of regulating the methods of conducting their business or fixing the prices of goods or for other legitimate purposes, such as was sustained by the court in Fuller *v.* E. C. Knight Co., 156 U. S. 1, where it was held that an agreement between manufacturers in a State bore no distinct relation to commerce between the States or with foreign nations, but it is one that brings within its scope not only local dealers but all the wholesale dealers in the same kind of goods in all the States. Said the court in Fuller *v.* E. C. Knight Co., 156 U. S. 17, "It is not essential that the result of the combination be a complete monopoly. It is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from competition." The local members were
bound by the articles of the association not to sell goods
210 to non-members except at prices which were more than double the prices which the members paid and which all dealers had paid before the association was formed, and the manufacturers were bound not to sell to non-members at any price or under any conditions. The testimony indicated that the defendants in error had been in constant competition with the San Francisco firms which entered into the association and had bid against them on contracts for work. The formation of the association shut off all such competition. The defendants in error were powerless to compete with local firms which possessed such advantages over them. The necessary effect of the combination was to crowd out of business every local dealer who was not a member and thereby to create a monopoly in the hands of those who were. It is argued that the defendants in error might have joined the association had they chosen to do so and that thereby they might have availed themselves of the privileges of membership. To this it is sufficient to

say that it does not appear that they would have been admitted to membership if they had applied. Under the by-laws they were not eligible for the reason that they did not at all times carry the requisite amount of stock, and if they had possessed the necessary amount of stock they had no assurance that they were "acceptable" to the members. On the contrary the fact that they were not invited to enter the combination when it was formed was a distinct intimation to them that they were not acceptable. But it is immaterial whether they would or would not have been admitted into the combination. To protect their business and secure their legal rights they were not obliged to submit an application for membership in such a combination with the possibility of its rejection, or to submit themselves to the rules and exactions of the association. It is clear also that the tendency of the combination was to prevent others from
211 engaging in the business. No one could become a member who had not "an established business" and it is too evident to admit of denial that no one could establish a business in competition with the members of the association who possessed such advantage in dealing with the manufacturers.

It is earnestly contended that the case in its principle comes within the doctrine of Hopkins *v.* United States and Anderson *v.* United States, 171 U. S., 578 and 604, but we think it is clearly distinguishable from those cases. In the Hopkins case the association, which was claimed to have been formed in violation of the act, was a local voluntary association of men whose business it was to receive at Kansas City consignments of cattle shipped from owners in various States and to feed, prepare for market, and sell the same, and pay the owners their portion of the proceeds after deducting charges and expenses. The rules of the association forbade members to buy stock from one who was not a member or to transact business with any person who violated its rules and regulations. The court held that the business of the members of the association was not interstate commerce and that the agreements or contracts relating to their business were not in restraint of interstate trade for the reason that trade between the States was not affected by the combination, which was a purely local one, comprising only members of the State in which it was formed. The Anderson case was similar to the Hopkins case with the exception that the members of the association were purchasers of certain classes of live stock instead of agents for the sale thereof. There was no association or combination between such purchasers and the vendors of the stock and no monopoly was created or was intended to be thereby created. The association itself transacted no business. The court said: "Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the
212 association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. * * * A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market

prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction." The difference between those cases and the case at bar is apparent. The resident members of the Tile, Mantel and Grate Association while they may compete with themselves have no competition with those who are not members for the latter are practically excluded from doing business within the portion of the State of California which is included in the prescribed area, and instead of being a combination between purchasers only, as was the fact in the Anderson case, it is a combination between manufacturers and buyers of different States which brings together on the one hand all the wholesale dealers in the United States in that line of goods and on the other hand the chosen few who are permitted to obtain goods and supply the local demand.

We find no ground for disturbing the finding of the circuit court concerning the amount of the attorney's fee to be allowed to the defendants in error. The judgment is affirmed.

(Endorsed:) Opinion. Filed Mar. 17, 1902. F. D. Monckton, clerk.

213 United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation, *et al.*, Plaintiffs in Error,
v.
EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error.
} No. 697. Judgment.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) Judgment. Filed and entered Feb'y 17, 1902, F. D. Monckton, clerk.

214 In the United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation; BUSH AND Mallett Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett and Schutte; John Stock Sons, a Corporation; Hevener, Meir and Company, a Copartnership Consisting of William C. Hevener and Charles W. Meir; Mangrum and Otter, a Corporation, and The Tile, Mantel and Grate Association of California, Plaintiffs in Error,

vs.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error.

Petition for Allowance of Writ of Error.

To the honorable the judges of the United States circuit court of appeals for the ninth circuit:

The plaintiffs in error, W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company,
215 a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of California, respectfully represent that they are the defendants and plaintiffs in error in the proceedings and action hereinafter mentioned, and that Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, are the plaintiffs and defendants in error in said action and proceeding.

And the defendants above named feeling aggrieved by the verdict of the jury, and the judgment entered on the second day of January, 1901, and the order of this honorable court made and entered on the 17th day of February, 1902, affirming the said judgment, come now by P. F. Dunne, Esq. and Walter H. Linforth, Esq., their attorneys, and petition said court for an order allowing said defendants, last above named, to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And your petitioners will ever pray:—

P. F. DUNNE,
WALTER H. LINFORTH,
Attorneys for said Defendants and Plaintiffs in Error.

(Endorsed:) Petition for allowance of writ of error. Filed Mar. 15, 1902, F. D. Monckton, clerk.

216 In the United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation; BUSH AND Mallett Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett and Schutte; John Stock Sons, a Corporation; Hevener, Meir and Company, a Co-partnership Consisting of William C. Hevener and Charles W. Meir; Mangrum and Otter, a Corporation, and The Tile, Mantel and Grate Association of California, Plaintiffs in Error,

vs.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error.

Assignment of Errors.

The plaintiffs in error, W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a co-partnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of California, by P. F. Dunne, Esq., and
217 Walter H. Linforth, Esq., their solicitors, having petitioned said court for an order permitting them to prosecute a writ of error to the honorable Supreme Court of the United States, from the judgment made and entered in said cause, now make and file with their said petition the following and specify the same as assignment of errors herein, and upon which they will rely for reversal of said judgment upon said writ.

I.

Specification of Insufficiency of Evidence.

I.

The evidence failed to show the making by the plaintiffs in error, or any or either of them, of any contract in restraint of trade or commerce among the several States, or with foreign nations.

II.

The evidence failed to show that the plaintiffs in error, or any or either of them, engaged in any combination in the form of trust or otherwise, in restraint of trade or commerce among the several States or with foreign nations.

III.

The evidence failed to show that the plaintiffs in error, or any or either of them, engaged in any conspiracy in restraint of trade or commerce among the several States or with foreign nations.

IV.

The evidence failed to show that the plaintiffs in error, or any or either of them, monopolized any part of the trade or commerce among the several States or with foreign nations.

V.

The evidence failed to show that the plaintiffs in error, or
218 any or either of them, attempted to monopolize any part of the trade or commerce among the several States or with foreign nations.

VI.

The evidence failed to show that the plaintiffs in error, or any or either of them, combined with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VII.

The evidence failed to show that the plaintiffs in error, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VIII.

The evidence failed to show that the plaintiffs in error, or any or either of them, attempted to combine with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

IX.

The evidence failed to show that the plaintiffs in error, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

X.

The evidence failed to show the existence of any contract, combination, or association whatever to which plaintiffs in error, or any or either of them, were related other than a voluntary association by the plaintiffs in error for the purpose of improving the conditions of the trade, in which said plaintiffs in error were engaged,
219 without in any respect affecting such trade in so far as the same existed between any States of this country or with any foreign nation, or in — respect or to any extent, or at all, restraining such trade in the directions last mentioned.

XI.

The evidence failed to show the existence of any monopoly or attempt at monopoly, or combination or conspiracy to monopolize or any attempt at such combination or conspiracy to which the

plaintiffs in error, or any or either of them, were related, with respect to any part of the trade or commerce among the several States of this country or with any foreign nation.

II.

Specifications Wherein the Verdict is Against Law.

I.

The verdict is against law in this, that there was no evidence tending to show the making by the plaintiffs in error, or any or either of them, of any contract in restraint of trade or commerce among the several States or with foreign nations.

II.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, engaged in any combination in the form of trust or otherwise, in restraint of trade or commerce among the several States or with foreign nations.

III.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, engaged in any conspiracy in restraint of trade or commerce
220 among the several States or with foreign nations.

IV.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, monopolized any part of the trade or commerce among the several States or with foreign nations.

V.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, attempted to monopolize any part of the trade or commerce among the several States or with foreign nations.

VI.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, combined with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

VII.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, conspired with any other person or persons to monopolize any part

of the trade or commerce among the several States or with foreign nations.

VIII.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, attempted to combine with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

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IX.

The verdict is against law in this, that there was no evidence tending to show that the plaintiffs in error, or any or either of them, conspired with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations.

X.

The verdict is against law in this, there was no evidence tending to show the existence of any contract, combination, or association whatever to which the plaintiffs in error, or any or either of them, were related, other than a voluntary association by the plaintiffs in error for the purpose of improving the conditions of the trade, in which said plaintiffs in error were engaged, without in any respect affecting such trade in so far as the same existed between any States of this country, or with any foreign nation, or in any respect or to any extent, or at all, restraining such trade in the directions last mentioned.

XI.

The verdict is against law in this, there was no evidence tending to show the existence of any monopoly, or attempt at monopoly, or combination or conspiracy to monopolize, or *at* any attempt at such combination or conspiracy to which the plaintiffs in error, or any or either of them were related, with respect to any part of the trade or commerce among the several States of this country or with any foreign nation.

III.

Errors in Law Occurring at the Trial.

I.

The court erred in refusing to instruct the jury, as requested by the plaintiffs in error, to render a verdict for the plaintiffs in
222 error, as will more particularly appear by the exception set forth in the bill of exceptions.

II.

The court erred in giving the following instructions:—

"The court is called upon to instruct you, that under the law, the members of this organization have in violation of law, entered into

a contract and combination in restraint of trade and commerce, and that they have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers in the east and the dealers in San Francisco, in the article of tiles. Under these instructions there is left for your consideration the single question of damages."

As will more particularly appear by the exception set forth in the bill of exceptions.

III.

The court erred in granting the motion of defendants in error for entry of judgment on the verdict of three times the amount thereof, as will more particularly appear by the exception set forth in the bill of exceptions.

IV.

The court erred in granting the motion of defendants in error in respect to counsel fee, that is to say, in granting such motion by the assessment of such counsel fee at the sum of seven hundred and fifty dollars ($750.00), as will more particularly appear by the exception set forth in the bill of exceptions.

V.

The court erred in entering judgment on the verdict for three times the amount thereof, or in any amount whatever, as will more particularly appear by the exception set forth in the bill of exceptions.

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VI.

The court erred in granting the motion for entry of judgment for counsel fees in the sum of seven hundred and fifty dollars ($750.00), or in any amount whatever, as will more particularly appear by the exception set forth in the bill of exceptions.

Wherefore plaintiffs in error pray that the said judgment rendered and entered herein in favor of the defendants in error be reversed, and that plaintiffs in error have judgment for their costs.

Dated this fourteenth day of March, 1902.

P. F. DUNNE,
WALTER H. LINFORTH,
Attorneys for Plaintiffs in Error.

(Endorsed:) Assignment of errors. Filed Mar. 15, 1902, F. D. Monckton, clerk.

224 In the United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation; BUSH AND Mallett Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett and Schutte; John Stock Sons, a Corporation; Hevener, Meir and Company, a Copartnership Consisting of William C. Hevener and Charles W. Meir; Mangrum and Otter, a Corporation, and The Tile, Mantel and Grate Association of California, Plaintiffs in Error,

vs.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error.

Order Allowing Writ of Error.

And now on this 14th day of March, 1902, on motion of P. F. Dunne, Esq., and Walter H. Linforth, Esq., of counsel for W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of Califor-
225 nia, defendants and plaintiffs in error in the above-entitled action, it is ordered that a writ of error herein be and is hereby allowed and in order to stay execution upon the writ of error, said defendants and plaintiffs in error last above named shall file a supersedeas bond in the sum of three thousand five hundred dollars.

WM. B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Order allowing writ of error. Filed Mar. 15, 1902, F. D. Monckton, clerk.

226 In the United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation; BUSH AND Mallett Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett and Schutte; John Stock Sons, a Corporation; Hevener, Meir and Company, a Corporation Consisting of William C. Hevener and Charles W. Meir; Mangrum and Otter, a Corporation, and The Tile, Mantel and Grate Association of California, Plaintiffs in Error,

vs.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents: that we, W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and the Tile, Mantel and Grate Association of California, as principals,

227 H. T. Bush, A. S. Mangrum and *and* Daniel Wilson, as sureties, are held and firmly bound unto Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, in the full and just sum of thirty-five hundred dollars ($3,500.00), for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, *jointly* by these presents:—

Sealed with our seals and dated this 14th day of March, 1902.

Whereas, at a term of said United States circuit court of appeals, for the ninth circuit, held at the city and county of San Francisco, in the State of California, in a suit pending in said court between Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, as plaintiffs, defendants in error above-named, and W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Manteland Grate Association of California, defendants, plaintiffs in error above-named, said above-named court by an order made, affirmed the judgment heretofore rendered and made on the 2nd day of January, 1901, by the circuit court of the United States, ninth circuit, northern district of California, against said above-named principals, in favor of said Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, for the sum of twenty-two hundred and fifty dollars ($2250.00), and $113.95 costs; and,

Whereas, upon the 14th day of March, 1902, the said

228 plaintiffs in error filed in said court their petition for an order allowing them to prosecute a writ of error to the Supreme

Court of the United States; and for an order of said court fixing the amount of security which they shall be required to give to the defendants in error in said action pending the prosecuting of said writ of error, to operate as a supersedeas and stay of execution until the said writ of error shall have been heard and determined in said Supreme Court of the United States, and,

Whereas, that upon the said 14th day of March, 1902, the said United States circuit court of appeals, for the ninth circuit, upon said petition duly made and had, entered of record in said court an order allowing a writ of error in said action in favor of W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of California, plaintiffs in error, from said judgment to the Supreme Court of the United States, and in said order also fixed the amount of security which the said above-bounden principals should be required to give, pending the determination of said cause in the said Supreme Court of the United States, and to stay execution herein, in the sum of thirty-five hundred dollars ($3500.00):

Now, the condition of this obligation is such, that if the said W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of
229 William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of California, shall prosecute said writ of error to effect and answer all costs and damages, if they shall fail to make good their plea; then this obligation shall be void; otherwise it shall be and remain in full force and effect.

W. W. MONTAGUE AND COMPANY,
By A. A. WATKINS, *Vice-President.*
BUSH AND MALLETT COMPANY,
By H. T. BUSH, *President.*
BENNETT AND SCHUTTE,
By JOHN H. SCHUTTE.
JOHN STOCK SONS,
By W. B. WEBSTER.
HEVENER, MEIR AND COMPANY,
By W. B. WEBSTER.
MANGRUM AND OTTER,
By A. S. MANGRUM, *President.*
THE TILE, MANTEL AND GRATE ASSOCIATION OF CALIFORNIA,
By W. B. WEBSTER, *Secretary.*
H. T. BUSH,
A. S. MANGRUM,
DANIEL WILSON,
Sureties.

230 UNITED STATES OF AMERICA,
Northern District of California, } ss:

H. T. Bush, A. S. Mangrum, and Daniel Wilson, being duly sworn, each for himself deposes and says: That he is a freeholder within the ninth circuit of California, and is worth the sum of thirty-five hundred dollars ($3500.00), exclusive of property exempt from execution, over and above all debts and liabilities.

H. T. BUSH.
A. S. MANGRUM.
DANIEL WILSON.

Subscribed and sworn to before me this 14th day of March, A. D. 1902.

[SEAL.]

O. C. PRATT,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Bond on writ of error. Filed Mar. 15, 1902, F. D. Monckton, clerk.

231 United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation, ET AL., Plaintiffs in Error,
v.
EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error. } No. 697.

Certificate of Clerk Circuit Court of Appeals to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing two hundred and thirty (230) pages, numbered from one (1) to two hundred and thirty (230), inclusive, to be a full, true and correct copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the transcript of record upon return to the annexed writ of error.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 20th day of March, A. D. 1902.

F. D. MONCKTON, *Clerk.*

232 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or

some of you, in a cause between W. W. Montague and Company, a corporation, *et al.*, plaintiffs in error, and Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

233 [Endorsed:] No. 697. U. S. circuit court of appeals for the ninth circuit. W. W. Montague and Company, a corporation, *et al.*, plaintiffs in error, *vs.* Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly, defendants in error. Writ of error. Filed Mar. 15, 1902. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

As within we are commanded, we certify, under the seal of our said circuit court of appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

By the court:

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

234 In the United States Circuit Court of Appeals for the Ninth Circuit.

W. W. MONTAGUE AND COMPANY, a Corporation; BUSH AND MALLETT Company, a Corporation; Mrs. Mary Bennett and John H. Schutte, Partners Trading as Bennett and Schutte; John Stock Sons, a Corporation; Hevener, Meir and Company, a Copartnership Consisting of William C. Hevener and Charles W. Meir; Mangrum and Otter, a Corporation, and The Tile, Mantel and Grate Association of California, Plaintiffs in Error,

vs.

EDWARD S. LOWRY and JAMES J. DALY, Partners Trading as Lowry and Daly, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Edward S. Lowry and James J. Daley, partners trading as Lowry and Daly, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals, for the ninth circuit, wherein W. W. Montague and Company, a corporation, Bush and Mallett Company, a corporation, Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett and Schutte, John Stock Sons, a corporation, Hevener, Meir and Company, a copartnership consisting of William C. Hevener and Charles W. Meir, Mangrum and Otter, a corporation, and The Tile, Mantel and Grate Association of California, are appellants, and you are respondents, to show cause, if any there be, why the judgment rendered against the appellants on February 17th, 1902, by the said United States circuit court of ap-
235 peals, for the ninth circuit, and also the judgment entered against appellants January 2nd, 1901, in the circuit court of the United States, for the northern district of California, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city and county of San Francisco, State of California, this 15th day of March, A. D. 1902.

WM. B. GILBERT,
Circuit Judge.

Service of the within citation and receipt of a copy thereof admitted this 15th day of March A. D. 1902.

REDDY, CAMPBELL & METSON,
CAMPBELL, METSON & CAMPBELL,
Solicitors for Lowry and Daly, Appellees and Respondents in Lower Court.

236 [Endorsed:] No. 697. In the United States circuit court of appeals for the ninth circuit. W. W. Montague and Company (a corporation) *et al.*, plaintiffs in error, *vs.* Edward S. Lowry and James J. Daly, partners trading as Lowry & Daly, defendants in error. Citation. Filed Mar. 18, 1902. F. D. Monckton, clerk. P. F. Dunne. Walter H. Linforth, attorney and counselor at law, Claus Spreckels building, San Francisco.

Endorsed on cover: File No. 18,513. U. S. C. C. of appeals, 9th circuit. Term No. 660. W. W. Montague & Company, a corporation, *et al.*, plaintiffs in error, *vs.* Edward S. Lowry and James J. Daly, partners trading as Lowry and Daly. Filed April 24th, 1902.

IN THE SUPREME COURT

OF THE

UNITED STATES

W. W. MONTAGUE AND COMPANY, a corporation, et al.,
Plaintiffs in Error,
vs.
EDWARD S. LOWRY et al.,
Defendants in Error.

No. 660.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement of Case.

This is an action at law brought by the defendants in error under section 7 of the Act of Congress of July 2nd, 1890 (26 Stats. 209, c. 647), sometimes called the Sherman Anti-Trust Act, to recover damages from the plaintiffs in error for injuries said to have accrued to the defendants in error from an alleged violation of the provisions of the Act in question, together with attorney's fees as provided by the Act.

Section 7 gives the measure of recovery at law and is as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 furnish the test of liability, and are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.
>
> "Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.
>
> "Sec. 2. Every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or

> with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding a year or by both said punishments, in the discretion of the Court."

It may be conceded that the plaintiffs in error, at the time of the alleged grievances, were members of a voluntary association known as the "Tile Mantel and Grate Association of California". The grievances in question—the injuries alleged to have been done within the purview of Section 7—need not detain us, for no question is made on this proceeding in error as to the amount of damages, $500, assessed by the jury against plaintiffs in error and trebled by operation of law, according to the terms of the Act. Plaintiffs in error have not deemed it important to go into the question of the alleged injury and the alleged damages in this proceeding. It may be assumed, then, that an injury of some kind within the contemplation of the Act was suffered by defendants in error to the extent of the damages as fixed by the jury. The Writ of Error has been sued out here mainly to try the question of liability —whether the voluntary association formed by the plaintiffs in error is obnoxious to the provisions of the Act of Congress; and incidentally whether the action of the Court was justifiable in mulcting plaintiffs in error in the sum of $750 for attorney's fees in a litigation where the whole cause of action was found by a jury to be worth no more than $500.

The character of the voluntary association in question is exhibited by its Constitution and By-Laws, which may be found at pages 47-52 of the Transcript. Such voluntary associations, among people engaged in mercantile pursuits, are familiar enough in this country and are regarded favorably in the law, as indicated by judicial decision in this country and as recently as the cases of Hopkins and Anderson, reported in 171 U. S. pages 578 and 604, respectively. The Constitution and By-Laws of the Tile, Mantel and Grate Association, as printed in the record, exhibit a familiar and useful type of mercantile organization. There are two sections, however, of Article III of the By-Laws upon which the claim of statutory liability is principally rested,—sections 7 and 8, found at pages 51-52 of the Transcript. They are as follows:

> "Sec. 7. No dealer and active member of this Association shall purchase, directly or indirectly, any tile or fire-place fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this Association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this Association, under penalty of expulsion from the Association."
>
> "Sec. 8. Manufacturers of tile or fire-place fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the 'Tile, Mantel and

Grate Association' of California shall forfeit their membership in the Association."

Do these sections bring the plaintiffs in error within the Act of Congress? That is the principal matter on this Writ of Error.

II.

Assignment of Errors.

The assignment as referred to the action of the Court in allowing an attorney's fee against the plaintiffs in error of $750 has been mentioned in the statement of the case. It will be considered later. The other assignments of error are mere expressions, various in form, of the central proposition that the voluntary association in question does not fall within the inhibition of the Act of Congress; and this is the first and principal question which the plaintiffs in error will present on this argument.

III.

The voluntary association known as the Tile, Mantel and Grate Association of California is not obnoxious to the provisions of the Sherman Anti-Trust Act.

It will be observed that the membership of the association is made up of active members and non-resident members; the active members are those engaged in business in San Francisco, or within a radius of 200 miles of San Francisco, not being manufacturers—in

a word the local dealers; the non-resident members are the manufacturers of tiles and fire-place fixtures throughout the United States. As a matter of fact there are no resident manufacturers of these commodities, so that the term non-resident is peculiarly applicable to those members who are not active members; that is to say, to the manufacturers. (Trans., p. 95.)

Now, then, it is provided in section 7 of Article III of the By-Laws (Trans., p. 51) that the dealers, members of the association, shall not purchase any of the articles in question from manufacturers who are not members of the association; and conversely it is provided in section 8, next after section 7, that the manufacturers shall not sell any of the commodities in question to any persons not members of the association. It is further provided in section 7, *supra,* that the dealers—that is to say, the active and local members—shall not sell "any unset tile for less than list prices to "any person or persons not a member of this associa-"tion". These two things, easily separable in thought and discussion—namely, the sale of unset tile by the local dealers, and, next, the purchase and sale of the designated commodities by the local dealers and the non-resident manufacturers, respectively—are the matters to be looked to in determining whether this voluntary association is an illegal combination or monopoly within the Sherman Act. And first, we take up the transactions between the local dealers and the non-

resident manufacturers, with special reference to the point that such dealers are not to make purchases from manufacturers not members of the association, and that such manufacturers in their turn, are not to make sales to dealers other than those who are active members of the association, carrying on business within the local limits indicated. Is there anything illegal in a combination or association acting upon such a rule or requirement as that? We say there is not.

On the policy and construction of the Act of Congress in general there is a full discussion in the *Trans-Missouri case* and in the *Joint Traffic case,* 166 U. S. 290, and 171 U. S. 505. Those cases hold that contracts or combinations in restraint of trade between the states are prohibited by the statute, without regard to the quality of the restraint, be it reasonable or unreasonable. They were concerned with agreements made by competing railway companies for the purpose of arriving at freight and passenger tariffs by convention as distinguished from competition; and powerful arguments were made in favor of the apparent restraint imposed by such agreements as protecting masses of capital invested in railway enterprises from the destructive consequences and dishonest practices of rate wars and ruinous competitions. But the Court ruled that this consideration was not relevant; that the statute must be given a somewhat literal and unqualified reading; and that any restraint of trade was within

the reach of the statute, and that agreements or combinations tending to stifle competition operated a restraint of trade within the statutory prohibition. It was further considered by the Court, as also in later decisions, that the restraint contemplated by the statute, though not qualified by any regard to its character as being reasonable or unreasonable, must nevertheless be direct and immediate and substantial, as distinguished from remote, incidental, indirect and insignificant. The restraint condemned by the *Trans-Missouri case* and the *Joint Traffic case* was direct and immediate in a very obvious sense, for it found expression in an endeavor to fix prices or rates by an arbitrary convention, to the exclusion of the play of the law of competition.

It must be noticed, however, in the case at bar, so far as the transactions between the dealers and the manufacturers are concerned, that the association fixes no tariffs or prices whatever; and it must be observed generally that the association itself does no business (See Constitution, *in loco;* Testimony, Trans., p. 77). Our point is, that it is lawful for a man to decline to work for another man or class of men, or to do business with another man or class of men, as he sees fit; and what is lawful for one man to do in this regard, several men may agree to act jointly in doing, and may make express and simultaneous declaration of their purpose. The lawfulness of a provision as between dealers and

manufacturers, such as is contained in the Constitution and By-Laws of the plaintiffs in error, is impliedly recognized in the *Hopkins case,* 171 U. S. 578, and, as we think, is aptly recognized and approved in the *Anderson case,* 171 U. S. 604. We cite also to the same point:

U. S. v. *Greenhut,* 51 Fed. 205;
In re Greene, 52 Fed. 104;
U. S. v. *Nelson,* 52 Fed. 646;
Dueber Mfg. Co. v. *Howard Co.,* 55 Fed. 851;
S. C. in error, 14 C. C. A. 14;
Gibbs v. *McNealy,* 102 Fed. 594;
Steamship Co. v. *McGregor,* L. R., 23 Q. B. 598;
Bohn v. *Hollis,* 54 Minn. 223.

Within these authorities and on a view of the Constitution and By-Laws of the association in question, it will appear that the provisions touching transactions between dealers and manufacturers are not obnoxious to the Act of Congress, and it will appear further that the association in question has none of the elements of a monopoly. Indeed, the object of the association is said to be, to unite all acceptable dealers and all American manufacturers (Trans., pp. 47-48). It is true (Trans., p. 48) that the dealers are required by the Constitution, section 1, Article I, to have an established business with not less than $3,000 worth of stock. The existence of the established business is part of the implication of the term dealer. The requirements as

to the amount of stock might be urged as a limitation upon the character of the association if it were not for the fact, as to which there is no conflict of evidence, that this requirement was disregarded and abandoned. (Trans., p. 73.) As the dealers or active members of the association are local dealers, it results that the association is open to every dealer; and it is made open to every manufacturer. It is not easy to understand how an association can be in restraint of trade or take on the features of a monopoly when its doors are wide open for every dealer and every manufacturer without distinction and when the association itself, as between the dealers and manufacturers, makes no attempt to fix prices, and, as an association, does no business (Trans., pp. 150, 151, 152).

The idea seemed to make a lodgment in the mind of the learned Circuit Judge that there was some analogy between this case and the case of a direct tax imposed by way of license in a given State upon drummers entering that State for the purpose of transacting inter-state commerce. The point of the analogy must be in the assumed likeness of relation between the tax imposed upon the drummer, and, in the case of the association here, the entrance fee of $10 required of the non-resident manufacturer. (Trans., p. 48.) It is very true that in the *Robbins case,* 120 U. S. 489, the taxation of drummers engaged in inter-state commerce was held to be in excess of the competency of the State

Legislature. But the tax there, in the shape of a license exacted of the drummer, was manifestly direct and immediate, and imposed with peculiar and exclusive reference to the circumstance that the drummer was engaged in commerce, it so being that the commerce was inter-state in character. We think, with great respect to the learned Circuit Judge, that the extension of this doctrine to the case of an entrance fee paid by a non-resident member of an association is somewhat strained and fanciful. No dues are required of the manufacturer, nothing beyond an entrance fee of $10; but even if he were required to pay dues in addition to his entrance fee, what then? The direct and immediate purpose of these fees and dues, as we all know, is to meet the incidental expenses of the association—like room rent, janitor's service, lights, fuel, stationery, and the like. There is no reference in the matter of these fees and dues to inter-state commerce, except in the most remote, incidental and trifling way (*Trans-Missouri* and *Joint Traffic cases, supra; Hopkins* and *Anderson cases, supra*).

This brings us to the second thing in sections 7 and 8 of Article III of the By-Laws (Trans., pp. 51-52), namely, the matter of the sale by the local dealers of *unset* tile. It is provided, as already pointed out, that the local dealers shall not sell any unset tile for less than list prices to non-members. Here is an element of convention as to prices—the fixing of prices by an understanding, so far as the quotation of prices to non-

members is concerned. Does this present the difficulty dwelt upon in the *Trans-Missouri* and *Joint Traffic cases* of substituting convention for competition in the ascertainment of the prices of commodities? And if it does, is the matter of convention, as distinguished from competition, of any importance at all in the transactions of local dealers in unset tile in a case concerned with a Federal Statute?

A word of explanation here as to unset tile and list prices: The tile, as shipped to California by the manufacturers, and before it is set up, around a grate, for example, or in a bath room, is called unset tile (Trans., p. 71). This is the commodity, this unset tile, as to which there is inter-state trade or commerce between the non-resident manufacturer and the local dealer. Unset tile is very seldom sold by the local dealer to a consumer in the local market (Trans., p. 72). Now, then, about list prices: An Eastern manufacturer, like the American Encaustic Tile Company, will get up a list of prices for its tile. It sells the tile to a San Francisco dealer, not at that price, which is a sort of maximum or point of departure, but at a lower price which is figured by subtracting from the maximum or list price certain discounts allowed to the local dealer called trade discounts (Trans., p. 72). The association in question, in aid of the provisions of section 7, *supra,* concerning the sale of unset tile at list prices to non-members, adopted the list price of the American Encaustic Tile Company (Trans., p. 72). In a word, a

San Francisco man, not a member of the association, who went to one of the local dealers to buy unset tile, would be charged the top figure or list price, where a member of the association in San Francisco, buying from one of the dealers, would be given the benefit of the discounts. It is important to recur again to the character of the dealers who are members of the association, as being local dealers, doing business in San Francisco or within a radius of 200 miles thereof. (Trans., pp. 47-48.) The point of this is, that the transactions in unset tile at list prices under section 7, *supra,* are local transactions, intra-state transactions, in no respect taking on the quality of inter-state commerce.

Now we make two points: First, that the transactions in unset tile at list prices being purely local, are not within the purview of the Act of Congress, and to this we cite the late case of *Addyston Pipe & Steel Co.* v. *U. S.,* 175 U. S. 211. The next point is, assuming merely for argument's sake, and only that, the transactions in unset tile to be along the line of inter-state commerce,—those transactions are so trifling, incidental and remote in their bearing upon inter-state trade and commerce as to be what mathematicians call negligible quantities which may be left out of consideration without impairing the general result. And they are governed by the rule laid down in the *Trans-Missouri case,* the *Joint Traffic case,* the *Hopkins* and

the *Anderson cases,* that transactions which are related to inter-state trade or commerce only in a trifling, incidental or remote way, will not operate to bring an agreement or association within the interdict of the Act of Congress. The utterly insignificant part played by the sale of unset tile at the hands of local dealers, whatever the price be, list or otherwise, is made plain by the following reference to the uncontradicted evidence:

"It was so insignificant that no account was kept of "it. * * * One per cent. would be a very conser- "vative estimate" (Trans., p. 74). "The percentage "was insignificant" (Trans., p. 77). Again, "so small "that we took no notice of it. * * * No difference "at all" (Trans., p. 78). Again, "less than one per "cent. of the total is sold unset". * * * "It is so "little we could hardly state it" (Trans., p. 73).

IV.

As to counsel fees.

The record shows that two witnesses testified, at the call of counsel for defendants in error, as to what a reasonable attorney's fee for the case in hand would be. It was not necessary to call witnesses, for the Court, as has often been said, is quite able to determine what a reasonable counsel fee would be, and in point of fact, having presided at the trial, is better qualified to pass upon this question than two or three witnesses who are brought in to answer a somewhat vague and general

hypothetical question. But, however this may be, the witnesses themselves testified that *the amount of the verdict* did not enter as an element into their judgment as to the attorney's fee (Trans., p. 87). It follows from this somewhat peculiar view of things that if a set of men are sued at law under section 7 of the Sherman Act for alleged damages, where the damages in fact did not exceed one dollar, and are so determined by the jury, an attorney's fee may be charged up against the defendants, a hundred or a thousand times greater than the cause of action or injury in controversy. A group of men may be haled into court upon a claim for damages of only merit enough to support a verdict in some nominal amount, and may be taxed in attorney's fees *ad libitum* for resisting an unfounded claim. Take the case at bar, for instance; the defendants in error demanded of the plaintiffs in error the payment of $10,000 by way of damages, and that such damages should be trebled. Plaintiffs in error refused to recognize that claim. Were they right? The jury have said that they were, for the verdict establishes the fact that the defendants in error demanded of the plaintiffs in error $9,500 more money than they were entitled to, or, in other words, demanded excessive damages, twenty-fold excessive in degree. Are the defendants in error to be taxed $750 attorney's fees for making such a resistance, with such results, to such an exorbitant demand? The attorney fee is 1½ times greater than the damages allowed; in other words, the attorney's

fee is 1½ times greater than the entire cause of action. It should certainly, we submit, be revised by this Court. This point is secondary and incidental, although, we think, obviously well taken. The main point, upon which we go to the Court with confidence, is that no case was made against the plaintiffs in error within the terms of the Act of Congress.

Respectfully submitted,

WILLIAM M. PIERSON,
Attorney for Plaintiffs in Error.

In the Supreme Court

OF THE

UNITED STATES.

W. W. MONTAGUE AND COMPANY (a corporation), et al.,

Plaintiffs in Error,

vs.

EDWARD S. LOWRY AND JAMES J. DALY, partners trading as Lowry & DALY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action prosecuted in the Circuit Court of the Ninth Circuit for the Northern District of California, by these defendants in error, under the provisions of the Act of July 2, 1890 (26 St. L., 209, C. 647), commonly known as the "Sherman Anti-Trust Act," against these plaintiffs in error, who

were members of a voluntary association known as the "Tile, Mantel and Grate Association of California," composed of dealers in tile, in San Francisco, and its neighboring cities, and several manufacturers, residing and doing business without the State of California.

The provisions of the constitution and by-laws (Trans., pp. 47-52) of that association, so far as they are material to this argument, are as follows:

"The objects for which this association is formed "are: To unite all *acceptable* dealers in tiles, fire-"place fixtures, and mantels in San Francisco and "vicinity (within a radius of two hundred miles), "and all American manufacturers of tiles," etc.

"Any individual, corporation, or firm engaged or "contemplating engaging in the tile, mantel, and "grate business in San Francisco, or within a radius "of two hundred miles thereof (not manufacturers), "*having an established business and carrying not less* "*than $3000 worth of stock, and having been pro-*"*posed by a member in good standing and elected,* "shall, after having signed the constitution and by-"laws governing said association, and upon the pay-"ment of an entrance fee, as hereinafter provided, "enjoy all the privileges of membership."

"All associated and individual manufacturers of "tiles and fire-place fixtures through the United "States may become non-resident members of this

"association upon the payment of an entrance fee, "as hereinafter provided, and after having signed "the constitution and by-laws governing said asso- "ciation."

"The initiation fee of this association shall be, for "active members twenty-five dollars, and for non- "resident members ten dollars, which amounts must "accompany each application for membership."

"Each active member of the association shall pay "ten dollars per year as dues, payable in advance on "the third Monday in August of each year. No "dues shall be charged against non-resident mem- "bers."

"No dealer and active member of this association "shall purchase, directly or indirectly, any tile or "fire-place fixtures from any manufacturer or resi- "dent or traveling agent of any manufacturer *not a* "*member of this association*, neither shall they sell "or dispose of, directly or indirectly, any unset tile "*for less than list prices* to any person or persons *not* "*a member of this association,* under penalty of ex- "pulsion from the association."

"Manufacturers of tile or fire-place fixtures or "resident or traveling agents of manufacturers sell- "ing or disposing, directly or indirectly, their prod- "ucts or wares to any person or persons not members "of the Tile, Mantel and Grate Association of Cal- "ifornia shall forfeit their membership in the as- "sociation."

The list prices referred to in the constitution are maximum prices from which many discounts were allowed to members of the association amounting on a cash transaction to 59¾ per cent (Trans., pp. 55, 60, 61, 72).

The following manufacturers, resident and conducting business without the State of California, were members of the association: Columbia Encaustic Tile Works of Anderson, Indiana; United States Encaustic Tile Works; Cambridge Tile Company of Covington, Kentucky; American Encaustic Tile Company of New York City; Star Encaustic Tile Company of Pittsburg, Pennsylvania; Trent Tile Company of Trenton, New Jersey; Maw and Company of England, having offices in Chicago; Providential Tile Works of Trenton, New Jersey, and Ohio Foundry Company (Trans., p. 52).

Lowry & Daly, the defendants in error, were carrying on the business of selling and setting tiles, mantels and grates in the city of San Francisco, and were not members of the association. Prior to the month of August, 1898, when the association was formed, they purchased practically all the tile used by them in their business from the Columbia Encaustic Tile Works. At this time they were in active competition with the other local dealers who subsequently joined the association (Trans., p. 54).

Upon the 23d day of August, 1898, the Columbia

Company wrote to Lowry & Daly advising them of the formation of the association, and notifying them that unless they were members thereof they, the company, could fill none of their orders transmitted after the receipt of the letter. Subsequently they refused to fill orders sent by Lowry & Daly upon the sole ground that they were not members of the association (Trans., pp. 57-59).

After this refusal Lowry & Daly made an effort to secure the tile necessary in their business, from the Eastern manufacturers, through one C. H. Clarke, who at one time had been the local agent of the Columbia Company, and at this time was acting as a commission merchant or broker. He wrote to the Cambridge Tile Manufacturing Company, the United States Encaustic Tile Company, and the Star Encaustic Tile Company, asking each if they would sell to customers of his not members of the association, and from all he received the same reply: that they could not sell outside the association; the Star Encaustic Tile Company referring him to the local dealers. Other manufacturers made no reply to his letters (Trans., pp. 62-65).

After the formation of the association Lowry & Daly were compelled to purchase the tile necessary to their business, from local association dealers at factory list prices—that is, without any discounts (Trans., pp. 60 and 61).

It was admitted on the trial by counsel for the defendants that "the members of this association, these "manufacturers, would not do business that was the "general purpose of the association, with the dealers "who were not members of the association" (Trans., p. 60).

The bill of exceptions recites: "Further testimony "was introduced from which it appeared that be- "tween the month of July, 1898, and the month of "January, 1899, by reason of the fact that certain "manufacturers of tile above mentioned, whose fac- "tories and place of business was out of the State of "California, but within the United States, declined "and refused to sell unset tiles to plaintiffs, whose "place of business was within the State of Califor- "nia, because such manufacturers were and the "plaintiffs were not members of the Tile, Mantel "and Grate Association of California, plaintiffs "were damaged in the sum of five hundred dollars" (Trans., p. 71).

The action was tried by a jury which found a verdict for the plaintiffs for five hundred dollars. Upon plaintiffs' motion an order was made for the entry of judgment for three times the amount of the verdict and for seven hundred and fifty dollars counsel fees (Trans., p. 87). Judgment was entered pursuant to the order (Trans., p. 88). Subsequently the defendants prosecuted a writ of error to the Circuit

Court of Appeals for the Ninth Circuit (Trans., p. 99), and upon the hearing thereof the judgment of the Circuit Court was affirmed (Trans., p. 110).

BRIEF OF ARGUMENT.

The Tile, Mantel and Grate Association of California is a combination declared to be illegal by the Act of July 2, 1890, for it is in restraint of trade or commerce among the several States, and was formed to and does monopolize such trade or commerce.

The Act in part provides as follows:

"Section 1. Every contract, combination in the "form of trust or otherwise, or conspiracy, in re- "straint of trade or commerce among the several "States, or with foreign nations, is hereby declared "to be illegal. Every person who shall make any "such contract or engage in such combination or "conspiracy, shall be deemed guilty of a misde- "meanor. * * *

"Sec. 2. Every person who shall monopolize, or "attempt to monopolize, or combine or conspire "with any other person or persons, to monopolize "any part of the trade or commerce among the sev- "eral States, or with foreign nations, shall be deemed "guilty of a misdemeanor. * * *

"Sec. 7. Any person who shall be injured in his

" business or property by any other person or corpo-
" ration by reason of anything forbidden or declared
" to be unlawful by this Act, may sue therefor in any
" Circuit Court of the United States in the district in
" which the defendant resides or is found, without
" respect to the amount in controversy, and shall re-
" cover threefold the damages by him sustained, and
" the costs of suit, including a reasonable attorney's
" fee."

This enactment of the National Legislature was designed to solve an economic problem, which industrial combination had produced, and to maintain an economic condition of free competition, which the spirit of our laws has always jealously guarded. Its object is dual: to protect the individualism of the producer and dealer, and to insure, for the benefit of the consumer, that values shall be normally regulated by the law of supply and demand, and shall not be enhanced by convention and the artificial stimulus of combination.

Its protection and remedy is extended to three classes of persons: the manufacturer, the middleman and the consumer. And these three classes again resolve themselves into two: vendors, the manufacturers and jobbers; purchasers, the jobbers and consumers. For the protection of the vendor class and to insure that neither the manufacturer nor the jobber shall be forced out of business and deprived

of his livelihood by a combination of commercial rivals, or be compelled to merge his independence and individuality in a combination in no manner subject to his control, the first section of the law was enacted making contracts, combinations and conspiracies in restraint of trade illegal. For the protection of the purchaser class and to insure that free and unhampered competition, which economists recognize as the only means of securing normal and natural values, the second section was enacted, making absolute or partial monopolies illegal.

That such is the purpose of the Act has been recognized by this Court, which say, in *United States* vs. *Trans-Missouri Freight Association* (166 U. S., 290, 323): "In business or trading combinations they may "even temporarily, or perhaps permanently, reduce "the price of the article traded in or manufactured, "by reducing the expense inseparable from the run- "ning of many different companies for the same pur- "pose. *Trade or commerce under these circum- "stances may nevertheless be badly and unfortun- "ately restrained by driving out of business the small "dealers and worthy men whose lives have been "spent therein, and who might be unable to readjust "themselves to their altered surroundings. Mere "reduction in the price of the commodity dealt in "might be dearly paid for by the ruin of such a class, "and the absorption of control over one commodity "by an all-powerful combination of capital.* In any

" great and extended change in the manner or meth-
" od of doing business it seems to be an inevitable
" necessity that distress and, perhaps, ruin shall be
" its accompaniment in regard to some of those who
" were engaged in the old methods. * * * It is
" a misfortune, but yet in such cases it seems to be
" the inevitable accompaniment of change and im-
" provement.

" It is wholly different, however, when such
" changes are effected by combinations of capital,
" whose purpose in combining is to control the pro-
" duction or manufacture of any particular article in
" the market, *and by such control dictate the price at*
" *which the article shall be sold,* the effect being to
" drive out of business all the small dealers in the
" commodity, *and to render the public subject to*
" *the decision of the combination as to what price*
" *shall be paid for the article.* In this light it is not
" material that the price of the article may be low-
" ered. It is in the power of the combination to raise
" it, and the result in any event is unfortunate for the
" country by depriving it of the services of a large
" number of small but independent dealers who were
" familiar with the business and who had spent their
" lives in it, and who supported themselves and their
" families from the small profits realized therein.
" Whether they be able to find other avenues to earn
" their livelihood is not so material, *because it is not*
" *for the real prosperity of any country that such*

" *changes should occur which result in transferring* " *an independent business man, the head of his estab-* " *lishment, small though it might be, into a mere ser-* " *vant or agent of a corporation for selling the com-* " *modities which he once manufactured or dealt in,* " *having no voice in shaping the business policy of* " *the company and bound to obey orders issued by* " *others.* Nor is it for the substantial interests of the " country that any one commodity should be within " the sole power and subject to the sole will of one " powerful combination of capital. Congress has, so " far as its jurisdiction extends, prohibited all con- " tracts or combinations in the form of trusts entered " into for the purpose of restraining trade and com- " merce."

And again in *Addystone Pipe and Steel Co.* vs. *United States* (175 U. S., 211, 244), this Court again recognize that such is the object and purpose of the Act: "We have no doubt that where the direct and " immediate effect of a contract or combination " among particular dealers in a commodity is to de- " stroy competition between them and others, so that " the parties to the contract or combination may ob- " tain increased prices for themselves, such contract " or combination amounts to a restraint of trade in " the commodity, even though contracts to buy such " commodity at the enhanced price are continually " being made. Total suppression of the trade in the " commodity is not necessary in order to render the

" combination one in restraint of trade. It is the " effect of the combination in limiting and restrain- " ing the right of each of the members to transact " business in the ordinary way, as well as its effect " upon the volume or extent of the dealing in the " commodity, that is regarded. All the facts and cir- " cumstances are, however, to be considered in order " to determine the fundamental question—whether " the necessary effect of the combination is to restrain " interstate commerce."

Such, then, being a general statement of the economic purpose of the Act, we must consider more particularly within what limits it operates, for the power of Congress being constitutionally restricted, that body cannot apply the remedy to all evils engendered by similar causes, but only to those arising from causes within its special supervision. And, therefore, the operation of the Act is confined to such combinations only as restrain or tend to monopolize interstate commerce over which Congress is given supervision by the Constitution.

What is interstate trade and commerce? The meaning of the terms as used in this Act have been definitely explained by this Court. In *United States* vs. *E. C. Knight Co.* (156 U. S., 1, 13), it is said: " Contracts to buy, sell or exchange, goods to be " transported among the several States, the transpor- " tation and its instrumentalities, and articles bought, " sold or exchanged for the purposes of such transit

"among the States, or put in the way of transit, may "be regulated, but this is because they form a part of "interstate trade or commerce."

And, again, in *Addystone Pipe and Steel Co.* vs. *United States* (175 U. S., 211, 241), this Court say: "As has frequently been said, interstate commerce "consists of intercourse and traffic between the citi- "zens or inhabitants of different States, and includes "not only the transportation of persons and property "and the navigation of public waters for that pur- "pose, but also the purchase, sale and exchange of "commodities. * * * If, therefore, an agree- "ment or combination directly restrains not alone the "manufacturer, but the purchase, sale or exchange of "the manufactured commodity among the several "States, it is brought within the provisions of the "statute. The power to regulate such commerce, "that is the power to prescribe the rules by which it "shall be governed is vested in Congress, and when "Congress has enacted a statute such as the one in "question, any agreement or combination, which di- "rectly operates, not alone upon the manufacture, "but upon the sale, transportation and delivery of an "article of interstate commerce, by preventing or "restricting its sale, etc., thereby regulates interstate "commerce to that extent and to the same extent "trenches upon the power of the National Legisla- "ture and violates the statute."

And in *Hopkins* vs. *United States* (171 U. S., 578, 597) it is said:

"Definitions as to what constitutes interstate com-
" merce are not easily given so that they shall clearly
" define the full meaning of the term. We know
" from the cases decided in this Court that it is a
" term of very large significance. It comprehends,
" as it is said, intercourse for the purposes of trade in
" any and all its forms, including transportation, pur-
" chase, sale, and exchange of commodities between
" the citizens of different States, and the power to
" regulate it embraces all the instruments by which
" such commerce may be conducted."

Do these decisions, which have thus thoroughly and exhaustively eludicated and explained the Act, constitute the law of the case at bar?

First, we will consider the object of the combination. Is it a subject of interstate trade and commerce?

Secondly, we will consider the constitution and by-laws of the Association, which evidence the agreement between the combined associates. Do they constitute a contract in restraint of trade?

Thirdly, we will consider the acts of the associates in pursuance of the agreement. Do they show a consideration in restraint of trade and commerce or a monopolization thereof?

The object of the combination is to regulate the

distribution of tile from the producers and manufacturers without the State, into the hands of the dealers and tile-setters within the State. The resident and local parties to the agreement purchase from the manufacturers, acts which constitute "purchase, sale, " and exchange of commodities between the citizens " of different States."

The constitution and by-laws of the Association evidence an agreement to regulate and restrain this commerce, first by diverting the subject thereof from those to whom free, unfettered and natural competition and normal trade laws would bring it, and secondly by fixing an unnatural and arbitrary price to dealers not members of the Association.

The preamble of the constitution of the Association recites that "The objects for which this Associa- " tion is formed are: To unite all *acceptable* deal- " ers in tiles, fire-place fixtures and mantels in San " Francisco and vicinity (within a radius of two hun- " dred miles), and *all American manufacturers* of " tiles." (Trans., p. 47.)

It will be seen that only *acceptable* dealers are eligible for membership and to the benefits of trade with the manufacturers. But who are acceptable? And to whom? The article on membership provides that "Any individual, corporation, or firm engaged " or contemplating engaging in the tile, mantel, and " grate business * * (not manufacturers), *hav-*

" *ing an established business and carrying not less* " *than $3,000 worth of stock, and having been pro-* " *posed by a member in good standing and elected,* " *shall, after having signed the constitution and by-* " *laws governing said association, and upon the pay-* " *ment of an entrance fee,* as hereinafter provided, " enjoy all the privileges of membership." And Section 8 of Article III of the by-laws (Trans., p. 52) provides that: "Manufacturers of tile or fireplace " fixtures, or resident or traveling agents of manu- " facturers *selling or disposing, directly or indirectly,* " *their products or wares to any person or persons* " *not members of the Tile, Mantel and Grate Asso-* " *ciation of California shall forfeit their member-* " *ship in the association,*" while the preceding section provides that: "No dealer and active member " of this association *shall purchase, directly or indi-* " *rectly, any tile or fireplace fixtures from any manu-* " *facturer or resident or traveling agent of any manu-* " *facturer not a member of this association; neither* " *shall they sell or dispose of, directly or indirectly,* " *any unset tile for less than list prices to any person* " *or persons not a member of this association, under* " *penalty of expulsion from the association.*"

It will be seen that any person desiring to engage in this interstate trade, and purchase tile from a manufacturer, a member of the association, is debarred from that right unless he be *acceptable* to the mem-

bers—that is, he must beg and sue the other dealers for the privilege of engaging in trade, and they may debar him therefrom at their will; he must have an established and prospering business; he must pledge himself to buy from none but this group of manufacturers, and must pay for the privilege. On the other hand, an Eastern manufacturer desiring to extend his sales into San Francisco and vicinity, finds a large part of that market closed to him unless he join the association, and if he join he loses all customers outside the association. Under any circumstances, the natural and normal market, either for the selling manufacturer or the purchasing dealer, is cut in two.

We submit that these provisions constitute a contract in restraint of trade or commerce between the States, and upon their face show clearly that such is the intent of the association.

As was said by his Honor, Judge Gilbert, on writ of error to the Circuit Court of Appeals:

"The local members were bound by the articles of
" the association not to sell goods to non-members
" except at prices which were more than double the
" prices which the members paid and which all deal-
" ers had paid before the association was formed, and
" the manufacturers were bound not to sell to non-
" members at any price or under any conditions.
" The testimony indicated that the defendants in
" error had been in constant competition with the

" San Francisco firms which entered into the associa-
" tion, and had bid against them on contracts for
" work. The formation of the association shut off
" all such competition. The defendants in error
" were powerless to compete with local firms which
" possessed such advantages over them. The neces-
" sary effect of the combination was to crowd out of
" business every local dealer who was not a member
" and thereby to create a monopoly in the hands of
" those who were. It is argued that the defendants
" in error might have joined the association had they
" chosen to do so, and that thereby they might have
" availed themselves of the privileges of member-
" ship. To this, it is sufficient to say that it does not
" appear that they would have been admitted to
" membership if they had applied. Under the by-
" laws, they were not eligible, for the reason that they
" did not at all times carry the requisite amount of
" stock, and if they had possessed the necessary
" amount of stock they had no assurance that they
" were 'acceptable' to the members. On the con-
" trary, the fact that they were not invited to enter
" the combination when it was formed was a distinct
" intimation to them that they were not acceptable.
" But it is immaterial whether they would or would
" not have been admitted into the combination. To
" protect their business and secure their legal rights
" they were not obliged to submit an application for
" membership in such a combination, with the possi-

" bility of its rejection, or to submit themselves to the " rules and exactions of the association. It is clear, " also, that the tendency of the combination was to " prevent others from engaging in the business. No " one could become a member who had not 'an estab- " lished business,' and it is too evident to admit of " denial that no one could establish a business in com- " petition with the members of the association, who " possessed such advantage in dealing with manufac- " turers" (Trans., p. 108).

See, also:

United States vs. *Coal Dealers' Association,* 85 Fed., 252.

But, whatever may have been the intent and object of the association, in the adoption of its constitution and by-laws, the record shows fully, clearly, and convincingly that it did restrain and monopolize trade and commerce between the State of California and other States. Lowry & Daly, prior to the formation of the association, had been purchasing all the tile used by them in their business from the Columbia Encaustic Tile Works of Anderson, Indiana (Trans., p. 54). Upon the 23d day of August, 1898, that corporation wrote to them, in part, as follows: "We " beg to advise you that we have become a member " of the Tile, Mantel and Grate Association of Cali- " fornia. We do not know whether you are members " of the same or not. * * We trust, however, that

"you are members, and if not, we request that you "join the association, if you can see your way clear "to do so. * * We will, of course, complete your "unfinished orders. * * As for the future, as "long as we are members of the association, we will, "of course, be compelled to confine our sales within "the association" (Trans., p. 57).

About August 26th, Lowry & Daly placed an order for tiles with the Columbia Company by telegram, and received a letter acknowledging the order, and continuing as follows: "We wrote you several "days ago about the tile dealers' association. As "stated in that letter, we do not know whether you "are a member or not, but as you have not had time "to receive our letter on the subject, we will book "this order, as we know that you have been buying "of us and are depending upon us. After receipt of "our letter on the subject of the association, we will "not be able to book further orders from you unless "you are members" (Trans., p. 58).

August 31st, Lowry & Daly sent in a further order, which was acknowledged and entered by the Columbia Company. September 1st, the Company wrote, referring to this last order: "We have looked this "matter up, and find that you have had time to re- "ceive our letter of the 23d inst. in regard to associa- "tion matters, and, as stated in that letter, we cannot "book any more orders from you after you have re- "ceived our letter of the 23d, unless you are mem-

"bers of the association," and telegraphed on September 22d: "We decline to book your orders after "August 28th, including car-load as written you "August 23d" (Trans., p. 59).

On September 17th, Clarke, the broker whom Lowry & Daly employed to secure tile from other manufacturers, if possible, wrote to the Cambridge Tile Manufacturing Company, of Covington, Kentucky, as follows: "It is possible that you are mem- "bers of the association. If you are not members, "are you free to sell dealers who are not members of "the association? I could place two car-load orders "at once with old customers of mine." He received the following reply: "We are members of the Cali- "fornia Mantel, Tile and Grate Association, and "are not free to sell to parties who are not members "of this association" (Trans., p. 62).

September 28th, he wrote to the United States Encaustic Tile Company, of Indianapolis, Indiana:

"Not knowing whether or not that you are members "of said association, I kindly ask if you are so situ- "ated that you can sell dealers who are not members "of the association? I have some old customers, and "good ones, too, not in the association. They would "place an order for two cars at once;" and received the following reply: "We are at this time members "of the association mentioned, and therefore feel

"that we should protect our regular customers" (Trans., p. 63).

September 17th, he wrote to the Star Encaustic Tile Company, of Pittsburg, Pennsylvania: "One "of my old customers, not a member of the associa- "tion, is in the market for a carload of floor tile. If "you are situated so that you can do business with "the people I refer to, I would be pleased to have "you notify me to that effect," receiving the following reply: "We beg to say our goods are handled "in your city by W. W. Montague & Co., Bush & "Mallet Co., and Bennett & Schutte, to any of whom "we beg to refer you for anything in the way of "encaustic tile you may desire" (Trans., p. 64).

The record also contains the express admission of counsel for these plaintiffs in error that the manufacturers who were members of the association would not do business with non-members (Trans., p. 60).

It clearly appears that the refusal of the manufacturers to sell and ship their goods to defendants in error *was solely by reason of the fact that they belonged to the association and defendants in error did not.* If this be not a restraint of commerce between the States, we cannot comprehend the meaning of the term, nor the definition which this Court has given it.

But this combination not only restrained, but monopolized interstate trade and commerce, placing the entire control of tile shipped from outside the

State of California by the associated manufacturers into the City of San Francisco and its vicinity in the hands of certain preferred dealers, members of the association.

As was said by this Court in *United States* vs. *E. C. Knight Co.* (150 U. S., 1-16):

"In order to vitiate a contract or combination, it "is not essential that its result should be a complete "monopoly; it is sufficient if it really tends to that "end and to deprive the public of the advantages "which flow from free competition."

The associated manufacturers refused to sell at any price or under any conditions to persons who were not members of their association, and the members could keep out any one they chose, thus placing in the power of the members to say who should and who should not purchase such commodities; who should and who should not act as jobbers and tile setters. The full power to control the membership being confided to the resident members, and following therefrom the right to limit the persons to whom the merchandise should be sold, a full and complete monopoly of the output of the associated factories within this territory was given to the local dealers, in unset as well as in set tile.

Lowry & Daly were engaged in the business of selling tile set in the walls and floors of buildings, and also unset tile. They were constantly entering

into competition with the dealers who became members of this association. Mr. Lowry testified (Trans., p. 54): "In bidding for work, I figured against "Montague & Co., Bush & Mallett, Mangrum & "Otter, Bennett & Schutte, Thomas Rigney, and *all* "of those who are in our complaint. I came in com- "petition with them on nearly every job I figured on, "one or the other."

And these very competitors entered into a combination with the manufacturers, and Lowry & Daly could obtain no tile. Their competition was eliminated. The resident members having monopolized the output of the factories, monopolized the trade in tile, and monopolized the contracts for setting the same. Not only was this firm excluded by the monopoly, but all other local dealers and contractors who were not members of the association.

And this monopoly, so formed by the association, had the effect toward which all monopolies tend; it arbitrarily fixed and raised prices to the consumer upon commodities in use by the public. It fixed an arbitrary list price at which tile should be sold to the public. It will be remembered that Lowry & Daly were contracting tile setters. In order to fulfill their contracts, it was necessary for them to go into the market and procure tile to be used in their contract jobs. They were, therefore, purchasers and consumers, and being non-members of the association, they, and all others in like position, were the public in

their relation thereto. Plaintiffs in error in the Court below attempted to make a distinction between set and unset tile, but the tile sold to dealers and contractors such as Lowry & Daly is unset tile, and if they did not belong to the association they were compelled to pay the list price, which was more than double the regular price—that is, the list price less discounts—to like dealers and contractors who were members.

The evidence of Mr. Webster (Trans., pp. 47, 71-75), the secretary and treasurer of the association, is instructive upon this question: "The manufac- "turers pack the tile in barrels and ship it to the deal- "ers as material to construct something of—to build "on the walls or complete some work with. Until it "is so used it is called unset tile. By the expression, "'unset tile,' we mean tile as a commodity, which has "not been put in the place where it is designed to be "used, just the same as brick, before it forms part of "a building, or cloth before it was made into clothes. "The commerce or trade between the manufacturers "in the East and the dealers in San Francisco is in "unset tile. Unset tile is very seldom sold to a con- "sumer in this market." (In passing, it will be noted that by "consumer" the witness means the *ultimate consumer,* not the contracting tile setter purchasing material for use in the contract job). "At the time "the Tile, Mantel and Grate Association of Califor- "nia was formed, the dealers in California were buy-

" ing unset tile from the manufacturers, and the tile " traded in between the dealers and the consumers in " California was set tile placed in the building com- " plete."

In reply to the question, "What does the term " mean, 'list prices,' as applied to unset tile?" he said: " It would apply to any list that the association might " adopt, at which they would sell unset tile to parties " not members of the association, or members of the " association, if you will, as well. The expression, " 'fifty, ten, five and five off for cash,' means a " discount off the list which they have issued. " To illustrate: If the Columbia Encaustic " Tile Company had a list, for example, tile, " $100 per barrel, a barrel of such tile sold " to you would cost you $100, 50 per cent " off, then 10 per cent. off that, and 5 per cent. off " further, and if you paid cash an additional 5 per " cent. off. The original price at which the manu- " facturer in the East sells his goods, and from which " the discounts are taken, is the list price. *At the* " *time of the formation of the association, this list* " *price was not of a constant and uniform quantity;* " *that is, the same quantity or same discount for each* " *manufacturer. There was a variance in the price-* " *list among the manufacturers.* The list price above " referred to is not the list price that is referred to in " Section 7 of the by-laws—that section refers to our " list price. *We adopted that list price at the time of*

"the formation of the by-laws, and in doing so, with "some changes, we adopted the list price of the "American Encaustic Tile Company."

We cannot conceive of any statement which would more conclusively show an arbitrary and conventional fixing of prices by a monopoly. Before the combination, the various independent manufacturers had different list prices and different discounts. Afterwards, to the public—that is, to non-members—a uniform, standard, and abnormal price was fixed, at which alone the non-associated consumer could procure the goods produced by *any* associated factory.

And, again, he said (Trans., p. 74): "The associ- "ation was formed for the benefit of all the tile deal- "ers, it being our expectation to have them all join. *"We had a provision in our by-laws to try and force "people to join the association—that is, if they were "not able to buy tile from other factories, they would "then come into the association with us.* The idea "was, if they could not get tile from other factories, "that provision would bring them in with us."

This testimony needs no comment. The record discloses the existence of every evil which the act was designed to correct. The local dealer and contractor is offered the choice of going out of business or merging his individuality in an association not subject to his control and sacrificing his independence thereto. The purchasing contractor and the selling manufacturer find the buying and selling market cut in two.

To the mediate consumer—that is, the contractor—prices are arbitrarily fixed and advanced, and to the ultimate consumer—the general public—prices are raised, through the death-blow struck at competition among the tile-setters by the monopolization of the factories' products.

Counsel for plaintiffs in error urge that the facts herein make a case within the rules in *Hopkins* vs. *United States* (171 U. S., 578), and *Anderson* vs. *United States* (171 U. S., 604). But we submit that there is no parallel between the facts in those cases and that at bar. In the *Hopkins* case, a number of live stock commission merchants doing business in Kansas City formed a voluntary association known as the Kansas City Live Stock Exchange. The business of the members of the exchange was to receive, individually, consignments of live stock from the owners of the same, residing both within and without the State of the place of business of the exchange; to feed the stock; to prepare it for market; to dispose of it; to receive the proceeds of the sale thereof from the purchasers; and to pay the owners their proportion, after deducting charges, expenses and advances. But the stock-raisers and owners were not parties to the association. The association did not regulate or restrain the distribution of the stock from producer to consumer, it simply regulated the dealings of the commission merchants in relation to the live stock

after it had come into their hands, and had ceased to be a subject of interstate commerce. The associates were not bound to deal with any certain body of stock-raisers, nor were any stock-raisers bound to deal exclusively with the associates. And this Court said: "The right of the owners themselves to sell "their own cattle is not affected or touched by the "agreement in question, while the privilege of hav- "ing their cattle sold for them at the market place, "frequented by defendants, and with the aid of one "of them is a privilege which they are charged for, "and which is not annexed to their right to sell their "own cattle. * * * In all the cases which have "come to this Court there is not one which has de- "nied the distinction between a regulation which di- "rectly affects and embarrasses interstate trade or "commerce, and one which is nothing more than a "charge for a local facility provided for the transac- "tion of such commerce. On the contrary, the cases "already cited show the existence of the distinction "and the validity of a charge for the use of the "facility."

In the *Anderson* case, the yard traders in the Kansas City stock yards formed an association similar to that in the *Hopkins* case, called the Traders' Live Stock Exchange, the distinction between the two exchanges being that in the *Hopkins* case the members sold consigned cattle on commission; in the *Anderson* case the members were purchasers of cattle in

the market. No attempt was made to monopolize the trade or to raise or lower prices by the combination, and it was held not to be a restraint of trade, this Court, therefore, not deciding whether the members of the exchange were engaged in interstate trade.

Counsel also urge that in transactions between the dealers and manufacturers that the association fixes no tariffs or prices, and that the association itself does no business. While perhaps it might be—although not disclosed by the record—that the associated manufacturers fix no prices for the associated dealers, yet the association does fix prices for non-associated dealers, and the associated dealers are unable to take advantage of lower prices offered by non-associated manufacturers—if such there be—for they are pledged not to buy from them. The statement that the association itself does no business is not accurate. As an association it does not buy and sell, but it controls and regulates the business of the associates. It is not essential that a combination of individuals should engage in their collective capacity in trade in order to restrain trade. If the dealings of the individuals are regulated by a common agreement, and are transacted within certain defined limitations, a restraint of trade is effected.

Counsel contend that since it is lawful for an individual to trade or decline to trade with another individual, or class of individuals, that several may agree jointly to do so and may so declare their in-

tention. We submit that this was not the rule at common law. For even if an association or corporation might decline to trade with an individual or class, yet several individuals could not combine and conspire with the set intent and purpose of their combination to shut another individual out of the market. Such a conspiracy is enjoinable in equity; such a combination is void at common law.

And far more stringent and severe is the enacted law of Congress. To so argue is to defy and set at naught the plain meaning of the Act. For any combination of which the avowed purpose is to exclude an intending and ready purchaser from the buying market,—or such portion of that market as was formerly furnished by the manufacturers thus associated together—is in restraint of trade, and all the power of words and magic of sophistry cannot avail to make it otherwise.

"*Every* contract, combination in the form of "trust or otherwise, or conspiracy, in restraint of "trade or commerce * * * is hereby declared "illegal," says the statute, and "*every* person who "shall monopolize, or *attempts* to monopolize, or "*conspire with any other person or persons* to "monopolize any part of the trade or commerce "* * * shall be deemed guilty of a misde-"meanor."

The life and vitality of that Act cannot be sapped by such specious reasoning and falsely premised ar-

gument. The right of combination which counsel asserts, is the very evil which the Act is intended to remedy; it is the very thing which Congress has said shall not be done.

And again counsel urge that it is only trade in unset tile that is restrained, and that since there was practically no interstate trade in unset tile, that the restraint is a negligible quantity; that the practical effect of the combination to restrain such interstate trade is so trifling and inconsiderable, as not to call for relief. And as the basis of this argument the testimony of Mr. Mangrum, a local dealer, is quoted (Trans., p. 77): "I should think that one per cent "would be a very conservative estimate" of the unset tile sold by the dealers, etc. But as we have already pointed out this and similar testimony refers to sales to ultimate, not mediate consumers. Sales were made to non-associated dealers of unset tile; they were debarred from the Eastern market for purchasing that commodity and were forced to buy it from the associated dealers, and after the association was formed Lowry & Daly were compelled to purchase all the tile needed to enable them to fulfil their contracts from such dealers. Assuredly the means of livelihood of a prosperous and active firm of contractors is neither an insignificant, nor a negligible quantity.

The Circuit Court erred neither in awarding counsel fees, nor in the amount of the fee awarded.

The Act provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor * * * and shall recover threefold the damages by him sustained, and costs of suit, including a reasonable attorney's fee."

Counsel in their brief measure the value of the services of the attorney by the amount of judgment recovered. While they admit that two witnesses testified to the amount, and that the Court was fully qualified to pass upon the question, yet claim that because the verdict of the jury was for five hundred dollars, the attorney fee should have been less, how much less he does not state. We submit that the Court below being fully cognizant of the services rendered, was competent to pass upon the amount of the fee.

It is not contended or claimed that services rendered in the trial of the cause which occupied five days' actual trial in Court (Trans., p. 87) were not of the value charged and allowed by the Court to the plaintiffs in the Court below. But the only contention is that the verdict being for five hundred dollars damages, the fee is excessive. We submit that

such is not the proper measure of the value of the services of attorneys in such cases.

The damages were but incidental to the wrong suffered by the plaintiffs in the Court below. The main object of the action was to have declared illegal this combination that was sapping the life out of their business, and threatening them with ruin and destruction, and when that was accomplished, they had done in a great measure what was intended, and the damages were but an incident to the wrong. But a suit for damages is the only method prescribed under the Act wherein a private individual can obtain redress.

We submit that this case is similar in character to suits for infringements of patents, and other cases wherein attorney's fees are allowed. In those cases the amount of damages recovered do not prescribe the amount that should be allowed for attorney's fees.

The rule contended for by plaintiffs in error is such a one as might guide a Court in allowing a fee for the collection of a promissory note. But not in cases of this character. We insist that such allowance was reasonable and proper, and should not be disturbed.

We respectfully submit that for the reasons herein given, the judgment of the Circuit Court be affirmed with costs, and an attorney's fee for services in this Court.

J. C. CAMPBELL,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 46.—October Term, 1903.

W. W. Montague & Co., a Corporation, et al., Plaintiffs in Error, vs. Edward S. Lowry et al. | In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 23, 1904.]

This action was brought under section 7 of the act of July 2, 1890, (26 Stat. 209; 3 Comp. Stat. 3202,) commonly called the Anti-Trust act. The section reads as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Plaintiffs in error (defendants below) seek to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, (115 Fed. Rep. 27,) affirming a judgment for plaintiffs, entered in the Circuit Court for the Northern District of California, upon a verdict of a jury. (106 Fed. Rep. 38.)

It appeared in evidence on the trial in the United States Circuit Court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in the city of San Francisco in the State of California, and dealing in tiles, mantels and grates, and that The Tile, Mantel and Grate Association of California, and the officers and members thereof, had since on or about the — day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San Jose in the State of California, and such organization was also composed of the manufacturers of tiles, mantels and grates, who were residents of other States, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the State of California. There were no manufacturers of tiles within the State of California, and all the defendnts who were residents of that State and who were also dealers in tiles, in the prosecu-

tion of their business, procured the tiles from outside the State of California and from among those manufacturers who were made defendants herein. The manufacturers and dealers were thus engaged in the prosecution of a business which, with reference to the sales of tiles, amounted to commerce between the States. Under these circumstances the dealers in tiles, living in San Francisco, or within a radius of 200 miles thereof, and being some of the defendants in this action, together with the Eastern manufacturers of tile, who are named as defendants herein, formed an association called The Tile, Mantel and Grate Association of California. The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fireplace fixtures and mantels in San Francisco and vicinity, (within a radius of 200 miles,) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution, article I, section 1, it was provided that any individual, corporation or firm engaged in or contemplating engaging in the tile, mantle or grate business in San Francisco, or within a radius of 200 miles thereof, (not manufacturers,) having an established business and carrying not less than $3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws governing the association. The initiation fee was, for active members, $25, and for non-resident members $10, and each active member of the association was to pay $10 per year as dues, but no dues were charged against non-residents.

An executive committee was to be appointed, whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join, if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of $3,000.

The by-laws, after providing for the settlement of disputes between the members and their customers, by reason of liens, foreclosure proceedings, &c., enacted as follows, in article III :

"SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel and Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tile were sold by a member to any one not a member, they were sold at the list prices so adopted, which were more than fifty per cent higher than when sold to a member of the association.

The plaintiffs had established a profitable business and were competing with all the defendants, who were dealers and engaged in the business of purchasing and selling tiles, grates and mantels in San Francisco prior to the formation of this association. The plaintiffs had also before that time been accustomed to purchase all their tile from tile manufacturers in Eastern States, (who were also named as parties defendants in this action,) and all of those manufacturers subsequently joined the association. The plaintiffs were not members of the association and had never been, and had never applied for membership therein and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tile from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than fifty per cent over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tile from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying $3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for $500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble

that sum, together with what the trial court decided to be a reasonable attorney's fee, was entered for the plaintiffs.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called Anti-Trust act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The non-member dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the manufacturer or to any San Francisco dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enchanced prices to the non-member as already stated.

The plaintiffs endeavored in vain to procure tile for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several States refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tile is, as we have said, not only narrowed but the prices charged by the San Francisco dealers for the unset tile to those not members of the association are more than doubled. It is urged that the sale of unset tile, provided for in the seventh section of the by-laws, is a transaction wholly within the State of California and is not in any event a violation

of the act of Congress which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enchancement of the price of the unset tile by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to one per cent of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tile from the manufacturers are shut out by reason of the association and their non-membership therein from purchasing their tile from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tile would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had so applied, was one to be arbitrarily determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable, the applicant would not be admitted, and whether they were or not, was a matter for the arbitrary decision of the association.

Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution, because they did not always carry stock worth $3,000, which, by section 1 of article I, was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by any one who could not come up to the condition. The case stands, therefore, that the plaintiffs had not been asked to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tile as they had been accustomed to do before the association was formed.

The consequences of non-membership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tile were enhanced so far as plaintiffs were concerned, and how by means of this combination interstate commerce was affected.

The purchase and sale of tile between the manufacturers in one State and dealers therein in California was interstate commerce within the *Addystone Pipe case*, (175 U. S. 211.) It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the States. *United States* v. *E. C. Knight Company*, (156 U. S. 1,) did not therefore cover it. It is not brought within either *Hopkins* v. *United States*, or *Anderson* v. *United States*, (171 U. S. 578, 604.) In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject matter of the agreement did not directly relate to, embrace or act upon interstate commerce, for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it.

There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the rendition of the verdict the

plaintiffs below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum therefor, from which it appeared that it would be from $750 to $1,000. The trial court awarded to the plaintiffs $750. The verdict being only for $500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.